In the

Supreme Court of the United States

OCTOBER TERM, 1946

No. 658

PACKARD MOTOR CAR COMPANY,
a Michigan corporation,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER, PACKARD MOTOR CAR COMPANY

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AUTHORITIES CITED

MISCELLANEOUS

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I.

OPINIONS BELOW

The opinion of the National Labor Relations Board in the Representation Case is reported in 61 N. L. R. B. 4, and the opinion in the Complaint Case is reported in 64 N. L. R. B. 1212 (R. I 32, III, 1791).

The majority opinion and the dissenting opinion of the Circuit Court of Appeals for the Sixth Circuit are reported in 157 F. (2d) 81-86 and are printed in the record (R. III, 2096-2108). The order of the Circuit Court of Appeals denying the Petition for Rehearing and the dissenting opinion filed in connection therewith are reported in 157 F. (2d) 87, and are printed in the record (R. III, 21, 27).

II.

JURISDICTION

The statutory provisions believed to sustain the jurisdiction of the Court in this case are:

(a). Section 10(e) of the National Labor Relations Act (49 Stat. 409, 29 U. S. C., Sec. 151), which provides that the decree of the Circuit Court of Appeals entered upon a petition for enforcement shall be final "except that the same shall be subject to review * * * by the Supreme Court of the United States and upon writ of certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (28 U. S. C., Secs. 346 and 347.)".

(b) Section 240 of the Judicial Code, as amended (28 U. S. C., Sec. 347).

The final judgment was entered in this cause by the United States Circuit Court of Appeals for the Sixth Circuit on August 12, 1946 (R. III, 2095), and the petition for rehearing, filed by the petitioner herein, was denied by that Court on September 30, 1946 (R. III, 2127).

The petition for writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit and brief in support thereof was filed October 28, 1946, and an order was entered by the Supreme Court of the United States on December 9, 1946, granting the petition.

III.

STATEMENT OF CASE

This case involves the construction and interpretation of the National Labor Relations Act and its application to the foreman level of management of the petitioner.

On October 19, 1944, the Foreman's Association of America (hereinafter called the "FAA"), an alleged unaffiliated labor organization, filed a Petition for Certification of Representatives, covering the foreman level of management of the petitioner, with the National Labor Relations Board (R. I, 44; II, 1299). The matter came on for hearing, and the Board, after denying petitioner's motion to dismiss the petition on the grounds that the foreman level of management of the petitioner were not employees under the Act and would not constitute an appropriate unit under the Act (II, 787), ruled, one member dissenting, that all of the personnel in the foreman level of management of the petitioner at Detroit, Michigan, were employees under the Act; that they constituted a unit appropriate for the purpose of collective bargaining under Section 9(b) of the Act, and directed that an election be held to determine whether the foremen comprising the unit wished to be represented by the F. A. A. (R. III, 1795, 1820, 1821). The election resulted in 666 votes being cast in favor of the Association, 435 votes against it, and 155 challenged votes which were not counted. The Board on April 18, 1945, certified the F. A. A. as the exclusive bargaining representative of the foreman unit (R. III, 1836-1837).

Petitioner refused to recognize the certification, and the Board filed its complaint alleging that the petitioner was guilty of unfair labor practices within the meaning of Section 8(1)(5) and Section 2(6)(7) of the Act, and after

a hearing thereon, entered an order directing the petitioner to cease and desist from refusing to collectively bargain with the Foreman's Association (R. I, 30; III, 1782). Thereafter, the Board, pursuant to Section 10(e) of the Act, filed a petition with the Circuit Court of Appeals for the Sixth Circuit for enforcement of its order (R. I, 1-4). As noted above, the Circuit Court of Appeals after hearing (and with one Justice dissenting) entered its final judgment enforcing the order of the Board on August 12, 1946 (R. III, 2095), and on September 30, 1945 (one Justice dissenting) denied the Petitioner's petition for rehearing (R. III, 2127).

The petitioner is a Michigan corporation organized in 1905 and carrying on its business for the purpose of this case in the City of Detroit, Michigan. The normal business of the petitioner is the manufacture and sale of automobiles, but its business at the time of the proceedings before the National Labor Relations Board in this case was the manufacture of war materials.

Petitioner has approximately 32,000 rank and file employees (R. III, 1815), who since 1937 have been represented by the United Automobile Workers of America, affiliated with the Congress of Industrial Organizations, hereinafter referred to as the "UAW-CIO" (R. III, 1409-1420; R. I, 403).

The manufacturing operations of the petitioner are broken down into two main divisions, which are in turn divided into approximately twenty smaller divisions, which in turn are subdivided into approximately 300 departments. Exhibits 22, 22A-22J, 23 A-23 I (R. II, 802-807; R. III, 1479-1498).

To directly supervise the manufacturing operations and activities of the rank and file workers, petitioner employs

approximately 125 general foremen, 643 foremen, 273 assistant foremen, and 65 special assignment men, who have the qualifications of foremen and who are used to replace and substitute for foremen and to work on special assignments (R. II, 801; R. III, 1817). These supervisors will sometimes be hereinafter refefred to as the "foreman level of management." The petitioner almost invariably selects its assistant foremen from the rank and file employees; its foremen from the ranks of assistant foremen; and its general foremen from the ranks of the foremen (R. II, 812, 813). The foreman level of management is in turn supervised by the higher levels of management, consisting of the president of the corporation; two vice-presidents; seven superintendents and managers of plants; 16 managers of divisions; 32 assistant managers of divisions; and 20 superintendents of divisions. Exhibits 22, 22 A-22 J, 23 A-23 J (R. II, 802-807; R. III, 1479-1498).

The different levels of management shown by the exhibits referred to above are as follows:

Title	Number
President	1
Executive Vice President	1
Vice President of Engineering	1
Manager of Aircraft Engine Plant	1
Assistant Manager of Aircraft Engine Plant	1
Night Superintendent Aircraft Engine Plant	1
Asst. Superintendent Aircraft Engine Plant	1
Manager of Car and Marine Engine Plant	1
Executive Assistant Car and Marine Engine Plant	1
Managers of Divisions (Includes Master Mechanic—Plant Engineer—Chief Inspector)	16
Assistant Managers of Divisions (Includes Assistant Master Mechanic — Assistant Plant Engineer—Assistant Inspectors)	32

Superintendent of Divisions (Some Superintendents as shown by the Charts have the same jurisdiction as Managers of Assistant Managers)	20
General Foremen	125
Foremen	643
Assistant Foremen	273
Special Assignment Men	65

The general foremen in some cases have charge of a single department; in other instances, they are in charge of as many as four departments (R. III, 1815; II, 802-803; III, 1884; I, 331-332, 433-435, 499). Where the general foreman is in charge of more than one department, a foreman or assistant foreman is usually in charge of each of such departments under the supervision of the general foremen (R. I, 448; R. II, 802-807; III, 1479-1498, 1816). When the general foreman is in charge of a single department, the foreman and assistant foremen under him either supervise the work of parts of the department, such as sub-assembly lines, or act as his aids in connection with the work of the entire department (R. I, 514, 287-288, 498, 656-657; II, 802-807; III, 1479-1498).

The foremen are a highly-paid group (R. II, 813; III, 1816, 1817), and with the exception of a very few assistant foremen are paid a monthly salary based on a 40-hour week (R. I, 373, 514, 515-516; II, 813-814; III, 1816), and receive additional payment for overtime (R. II, 815-820; III, 1816). The salary range for general foremen is from $280 to $375 per month; for foremen, from $220 to $370 per month; and for assistant foremen, from $220 to $315 per month, depending upon the type of work done and the department in which the foreman acts as supervisor (R. I, 421-422, 480-481; II, 814; III, 1816). General foremen with overtime pay receive approximately $500 per month; foremen, approximately $450 per month; and assistant foremen, approximately $400 per month.

The foremen in other respects besides compensation are treated by the petitioner as a group apart. Unlike ordinary employees, foremen are paid for justifiable absences and for holidays; they are not docked for reporting to work late, and do no manual work. They receive longer paid vacations and are given severance pay upon release by the Company (R. I, 516; II, 822-825; III, 1506-1510, 1817-1818).

The general foremen instruct and supervise the work of the foremen and assistant foremen under them and recommend changes in their terms and conditions of employment, such as rates of pay, transfer, pay-off, promotion, discharge or discipline (R. I, 301-302, 332-334, 517, 523-526, 564-565, 584-596, 610; III, 1816). These recommendations (as found by the Circuit Court of Appeals) are usually followed (R. III, 2097, 1466, 1467; I, 337, 338-340, 346, 365, 611).

The foremen and assistant foremen make like recommendations, which are usually followed, concerning the pay, discharge, demotion, discipline, etc., of the workers under them (R. I, 534; III, 2097).

The foremen are responsible for maintaining quantity and quality of production (R. I, 299, 311, 331-332, 513-514, 603; II, 713-714; III, 1799, 1816). While the rank and file workers are hired through the employment department in the first instance, it is the duty of the foremen to send in recommendations for men needed by him (R. I, 310, 353); and if a worker does not meet the requirements to send him back to the employment office (R. I, 315).

The foremen are in charge of the first step in the grievance procedure provided for in the contract between the petitioner and the UAW-CIO, the union which repre-

sents the rank and file workers (R. III, 1409, 1410; I, 403). If a worker thinks he has a grievance, it is first discussed by the foremen with the chief steward of the union, and an attempt is made to settle the difficulty (R. I, 530). Most grievances are settled at the first stage by the foremen (R. I, 559-560, 616). Many of the grievances are trivial, but if not taken care of would become of major importance; by adjusting little grievances, large ones are avoided (R. I, 642).

The petitioner has conducted a school for foremen for a number of years. At this school classes are conducted on a conference basis in which the foremen participate and their problems are discussed (R. I, 374-383, 419, 512, 517-518; II, 825-827; III, 1817, 1819).

Foremen must set a good example, must show interest in the workers, develop team work among their workers, show appreciation for their efforts, and maintain uniform discipline standards (R. II, 953).

A foreman must be a good leader, be able to get along with the workers, have good judgment, use common sense, be level headed, even tempered, and impartial (R. I, 522, 528; II, 953-954).

The functions and responsibility of foremen in connection with the manufacture of automobiles commence with the development of a new model (R. II, 902-903). The foremen are consulted in connection with the methods to be used in manufacturing the various parts (R. II, 709, 902, 966, 1004), the tools to be used and processes to be followed (R. II, 904). It is the responsibility of the foremen to set up their departments for operations (R. II, 907), to request trial runs on materials (R. II, 908, 1002), supervise tests of materials (R. II, 941), and make recommendations in connection therewith, the majority of which are approved (R. II, 1002).

The Board in the instant case attempted to differentiate between the foremen of the 1900s and the foremen of today. The lower court, after finding that the duties, powers and responsibilties of the foremen of petitioner were substantially as set forth above, had this to say on the question of their present status as compared with their status in the early years of this century:

> "* * * In an exhaustive report filed January 19, 1945, made by a panel of distinguished economists established by the National War Labor Board to deal with disputes in major automobile and shipping industries involving supervisors, including that between Packard and certain of its foremen, the panel recognized that for a long time the responsibilities and authority of the foreman had been undergoing a slow change, resulting in a drop in his authority and in his responsibility for making policies, and a rise in the foreman's responsibility for executing policies. However, the panel concluded:
>
> > 'These trends do not mean that the foreman's job is becoming less exacting or that it can be filled by less competent people. On the contrary, the need for able men in the posts of foremen seems to be growing. The foreman may be given more and more ready-made policies to execute, more and more standard practices to observe in executing them, and more and more help from a variety of service departments, but he is also held to higher and higher standards in meeting production schedules, in maintaining standards of quality, and in dealing with personnel. Furthermore, higher management cannot escape dependence upon the foreman's knowledge of men and conditions and upon the wisdom and fairness of the foreman's judgment. On many matters the foreman may only recommend action, but his recommendations must usually be accepted by superiors who know too little about the circum-

> stances of specific cases to reject the foreman's recommendation. Hence no matter how well conceived the company's production and labor policies may be at the top, they are in fact no better than they become at the hands of the foremen who execute them.' "

The full report of the National War Labor Board Panel was admitted in evidence and appears in the record as Board's Exhibit 19, C. case (R. III, 1851-2082).

The lower court specifically found that: "The foremen are the front line of management," (R. III, 2097), and

> "'*The foreman plainly acts in the interest of management.* As succinctly stated in Bulletin 66 of the United States Department of Labor, Division of Labor Standards, 'The foreman is the operative executive of management * * *, the official contact for workers and shop stewards * * *, the department executive. * * *' This same bulletin states, *and under this record the statement is correct,* 'It goes without saying that the foreman's primary responsibility is to protect the interests and rights of management.' " (R. III, 2102-2103.)

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* Emphasis added unless otherwise indicated.

IV.

ASSIGNMENT OF ERRORS

1. The Circuit Court of Appeals erred in holding that the petitioner's general foremen, foremen, assistant foremen, and special assignment men were "employees" within the meaning of the National Labor Relations Act.

2. The Circuit Court of Appeals, after holding that the general foremen, foremen, and special assignment men of the petitioner were "employees" within the meaning of the National Labor Relations Act, erred in holding that the Board could properly include such "employees" in any unit for the purpose of collective bargaining.

3. The Circuit Court of Appeals, after holding that the petitioner's general foremen, foremen, assistant foremen, and special assignment men were "employees" within the meaning of the Act and could be placed in an appropriate unit, erred in holding that the Board could properly include such "employees" in a single unit for the purposes of collective bargaining.

V.

SUMMARY OF ARGUMENT

POINT I

The general foremen, foremen, assistant foremen, and special assignment men are not "employees" within the meaning of the National Labor Relations Act, and therefore the Board was without jurisdiction in this case. The Act was adopted by Congress in the hope that obstructions to the free flow of commerce caused by strikes and industrial unrest could be eliminated by requiring employers to bargain collectively with their employees. Congress defined an "employer" as including "*any person acting in the interest of any employer, directly or indirectly* * * *" The Act does not define "employee," but provides that "an 'employee' shall include any 'employee'," except certain specifically excluded classes of no importance here.

Thus Congress first defined an "employer" as including any person acting in the interest of the employer, directly or indirectly. Then followed the statement with respect to an "employee." By so expressing itself, Congress necessarily excluded from the second classification the class which it had already defined and limited.

The foremen of the petitioner act directly in the interest of the petitioner, as was found by the Circuit Court of Appeals in this case. Furthermore, the courts and the Board have invariably held that the acts or omissions of foremen will be imputed to the employer solely by virtue of the relationship, and even though the Company officers were unaware of the activities of the foremen and did nothing to encourage them, and therefore such foremen are held to act directly for their employer in connection with the very subject matter of the Act. Congress, as

noted above, sought to cure labor unrest by requiring collective bargaining. Collective bargaining does not end with the execution of the contract with the labor union representing the rank and file; it continues on a day-to-day basis. The petitioner's contract with the CIO covering the rank and file workers deals with rates of pay, transfers, lay-offs, rehiring, demotions, discharges and discipline of the rank and file. The foremen of the petitioner are the first step in the grievance procedure under the contract and are the point of contact between management and such workers. They must represent the petitioner in solving the grievances and questions arising out of the applications of the provisions of the contract to the rank and file. They thus act directly in the interest of the petitioner in carrying out the very purpose of the Act, namely, collective bargaining.

Furthermore, the purpose of the Act, as expressed by Congress, is to prevent strikes and labor unrest. There is no evidence that prior to the adoption of the Act there had been strikes of supervisors. The strikes and labor unrest that Congress had in mind related to the rank and file employees. See U. S. Department of Labor Bulletin No. 651, dated August, 1937.

The Act constantly refers to "wages," "wage earners," "wage rates," and "workers." The Act itself is called the "National *Labor* Relations Act." It is evident, therefore, that Congress had in mind the rank and file worker, and not any part of the managerial structure of industry.

Legislative history of the Act indicates that Congress did not intend that foremen should be considered "employees," and in the Congressional debates, there is no mention made of supervision. Constant reference, however, is made to "wages," "hours," "workers," "labor" and "working men." See 79th Congressional Record No.

101, p. 7846 *et seq.*, No. 102, pp. 7949 to 7960, 7967 to 7980. It is clear that the dominant purpose in the minds of proponents of the National Labor Relations Act was to enact legislation by which the "laborers," "wage earners" and "workers" might gain collective bargaining rights, and that it was not intended that supervisory employees were to come within the provisions of the Act.

Related legislation supports the position taken by the petitioner. In the Merchant Marine Act of 1936 (46 U. S. C. 1251), the word "employee" is defined as meaning "any person who performs any work as an employee or *subordinate official* * * *" Subsection 6 of Section 1101 of the Social Security Act (42 U. S. C. 1301) provides: "The term 'employee' includes an officer of the corporation." It is only reasonable to assume that if Congress had intended to include foremen within the term "employee" in the National Labor Relations Act, it would have evidenced that intent.

The action of Congress in adopting the Case Bill (later vetoed by the President), which provided that no supervisory employee should have the status of an "employee" for the purposes of Sections 7, 8 and 9 of the National Labor Relations Act, and the debates in connection with the Case Bill on this matter clearly indicate that it was never the intention of Congress to include supervisors under the coverage of the National Labor Relations Act.

Congress must be presumed to have enacted the Act having in mind the universal rule that an agent will not be allowed to enter into a relationship which may conflict with the interests of the principal. The foremen are the agents and representatives of the petitioner and should not be permitted to subject themselves to the influence, pressure or control of a union whose principles,

as hereinafter set forth, would be contrary to the interests of the petitioner.

A construction of the Act which would include supervisory employees within its coverage would lead to unreasonable and intolerable results and would be contrary to the public interest, the interest of the rank and file employees, the supervisors and the employers for the reasons set forth under Point II.

POINT II

If the foremen of the petitioner are "employees" within the meaning of the Act, then the Board assuming it had jurisdiction so to do, erred in including these foremen in any unit for the purpose of collective bargaining. Because of the uncertainty of the Board on this question, the fact that its own members cannot agree and that the Board apparently is not too convinced of the correctness of its own statements, the Court should, as invited to do by Chairman Herzog when he appeared before the Committee on the Case Bill, examine into the Board's findings and determinations in this matter and not feel constrained to accept such findings and determinations because of any presumed specialized experience or expert knowledge on the part of the Board.

The members of the Board in the various opinions given in connection with this issue have pointed out very clearly that the establishment of units of foremen, even in separate bargaining unit, would bring about organizational rivalry; would impinge upon the right of the rank and file under the Act, and would place the employer in an impossible position because the employer is responsible for the interference by his supervisors with rank and file organizational activity, and would do damage to the delicate

balance between the interests of management and worker which the Act sought to solve.

Forced collective bargaining with a unit of foremen would result in the application of the so-called union principles to a part of management, and the result would be against the public interest and the policy of the Act. The ranks of management would be split, divided loyalty would result, management could not rely on the foreman to properly enforce discipline or to carry on his duties because management would never know whether decisions made were in the interest of the Company or because of union pressure. The status of the foreman would have to be reduced. The foremen could no longer be management's representatives in grievance procedures because this responsibility would have to be given to someone whose undivided loyalty was solely to management. The union leaders would enforce the so-called majority rule and force foremen to strike even against their own wishes and better judgment. It would result in the application of the union rule of promotion by seniority rather than by merit. Management to effectively manage must be left to determine for itself the appropriate weight to be assigned to merit, ability and seniority in connection with the laying off, demoting, promoting or transferring of supervisory employees, and if it does not have this right, the effect upon the quality of management and the efficiency of American industry would be unfortunate, if not disastrous. The effect on the rank and file would likewise be highly undesirable.

In the event the Court should determine, as now claimed by the Board, that it must place a person who is an employee under the Act in some unit for the purpose of collective bargaining, then the reasons stated above demonstrate that Congress could never have intended to include supervisors as employees under the Act.

POINT III

Even though the foremen of the petitioner are employees under the Act and must be placed in an appropriate collective bargaining unit, which the petitioner, of course, does not admit, the Board abused its discretion in placing all four classes of supervisors in the same unit. By its action, the Board placed 125 general foremen of the petitioner in the same unit with approximately 1,000 foremen and assistant foremen, thus regimenting the general foremen in a unit with the very men over whom the general foremen have for all practical purposes power to promote, demote, discipline and discharge. Under these conditions, where the general foremen would be outvoted 10 to 1, it goes without saying that not only would a conscientious foreman be eliminated, but the whole function of foremen as a part of supervision would cease to exist. They would find themselves in conflict with other members of the union over the exercise of their responsibilities and duties. The "imposition of such strains upon personal allegiance and personal interest would undoubtedly be detrimental to the public interest and to the free flow of commerce."

VI.

ARGUMENT

POINT I

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE PETITIONER'S GENERAL FOREMEN, FOREMEN, ASSISTANT FOREMEN, AND SPECIAL ASSIGNMENT MEN WERE "EMPLOYEES" WITHIN THE MEANING OF THE NATIONAL LABOR RELATIONS ACT

A. THE CONSTRUCTION PLACED UPON THE ACT BY THE BOARD AND BY THE LOWER COURT IS NOT BINDING UPON THIS COURT.

It is the position of the petitioner that the Board is without jurisdiction in this case and that the Act does not apply and was never intended to apply to the foreman level of management because such a construction, interpretation and application would be contrary to the wording, the purpose, and the spirit of the Act.

The construction of the Act by the Board is not binding upon the Court. Questions of statutory interpretation are for the courts to resolve, giving appropriate weight to the judgment of those who have a duty to administer the law. *Western Union Telegraph Co. v. Lenroot*, 65 S. Ct. 335; *N. L. R. B. v. Hearst Publications*, 322 U. S. 111.

B. THE LANGUAGE OF THE ACT IS CLEAR AND UNAMBIGUOUS AND ITS PROVISIONS DO NOT INCLUDE SUPERVISION.

In Section 1 of the Act, Congress found that experience had proved that the protection by law of the right of employees to organize and bargain collectively promoted the flow of commerce by removing certain recognized sources of industrial strife and unrest, and by restoring equality of bargaining power between employers and employees.

The collective bargaining must, of course, be between the employer and the employee. Mass industry is conducted through corporate organizations. These "legal owners" are artificial persons and can only act through representatives and agents. Congress had this in mind when the Act was adopted, and it therefore became necessary for Congress to define the term "employer." This Congress did in Section 2 of the Act which reads in part as follows:

> "Section 2. * * *
>
> (2) The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.
>
> (3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equiva-

> lent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

In common parlance, of course, every person who performs services for the petitioner in this case is an employee. The President is an employee—so are the Vice-Presidents, the foremen, and the rank and file worker. It does not follow, however, that the Presidents or the Vice-Presidents, or foremen are employees within the meaning of the Act. The Court in *N. L. R. B. v. Hearst Publications, Inc.*, 322 U. S. 111, 129, in discussing the word "employee" in the Act said: "That term, like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship."

Section 2 of the Act, quoted above, sets forth two classifications: the first is the "employer," which includes *any* person acting in the interest of an "employer."

It is only after placing supervision within the term "employer" that Congress proceeds to consider the second of the two classifications, to-wit, "the employee." As stated by Judge Simons in his dissenting opinion in this case:

> "The two sections must be read *in paria materia*, and so considered, the breadth of the one necessarily limits the ambit of the other" (R. III, 2108).

The foremen of the petitioner act directly in the interest of the petitioner. The Circuit Court of Appeals in this case found that: "The foremen (at Packard) are the front line of management" (157 F. (2d) 80, 81) (R. III, 2097). The Court further said (p. 84) (R. III, 2102-2105):

> "The foreman plainly acts in the interest of management. As succinctly stated in Bulletin 66 of the U. S. Department of Labor, Division of Labor Standards, 'The foreman is the operative executive of management * * *, the official contact for workers and shop stewards * * *, the department executive * * *' The same Bulletin states, and *under this record the statement is correct*, 'It goes without saying that the foreman's primary responsibility is to protect the interests and rights of management.'"

Furthermore the Board and the courts heretofore have passed upon what will be considered an unfair labor practice by an "employer" within the meaning of Section 8 of the Act. There are many decisions which in substance hold that foremen are really the "employer" in such a case, and that their acts and omissions are imputed to the employer solely by virtue of the relationship, and even though the Company officers were unaware of the activities of the foremen and did nothing to encourage them.

This court had the question before it in the case of *H. J. Heinz Co. v. N. L. R. B.*, 311 U. S. 514.

The Court found in the above case that a general foreman was active in disparaging the union; that the foremen were active in soliciting employees to join an independent union called the "Association." The Court assumed that the Company officers were unaware of the activities of the supervisory staff, and did nothing to encourage them. The Court further found that foremen had authority to recommend employment, discharge, and wage increases. The Court also found that were was evidence supporting the Board's conclusion that the "employees regarded the foremen and group leaders as representatives of the Company" and that a number of employees signed as members of the Association "only because of the fear of their jobs or of

discrimination by the employer induced by the activities of the foremen and group leaders." The Court then held that there was an adequate basis for the Board's order prohibiting "petitioner, its officers and agents from interfering with the exercise of its employees' rights of self organization or with the administration of the Association or contributing to its support."

To the same effect see:

N. L. R. B. v. Link-Belt Co., (1941), 311 U. S. 584; *N. L. R. B. v. American Mfg. Co.*, 106 F. (2d) 61; *N. L. R. B. v. Chicago Apparatus Co.*, 116 F. (2d) 753; *New Idea Inc. v. N. L. R. B.* (1941), 117 F. (2d) 517; *N. L. R. B. v. Faultless C. Corp.* (1943), 135 F. (2d) 559; *N. L. R. B. v. Security Warehouse & Cold Storage Co.*, 136 F. (2d) 829; *N. L. R. B. v. Fitzpatrick & Weller* (1943), 138 F. (2d) 697; *N. L. R. B. v. Brewer Tanning Co.* (1944), 141 F. (2d) 62; *N. L. R. B. v. Engineering & Research Corp.*, 65 S. Ct. 560.

Furthermore, the foremen of the petitioner act directly in the interest of the petitioner in carrying out the major purpose of the Act, to-wit, collective bargaining. Collective bargaining does not end with the execution of the contract between the employer and the labor union representing the rank and file. Collective bargaining continues on a day-to-day basis. The terms and conditions of the labor contract must be interpreted, applied and enforced in connection with situations and grievances which arise from day to day. The petitioner's contract with the CIO, the union of the petitioner's rank and file workers (R. III, 1409-1420), covers rates of pay, transfers, lay-offs, rehiring, demotions, discharges and discipline of the rank and file. The foremen of the petitioner are the first step in the grievance procedure under the CIO contract (R. III, 1409, 1410-1411) and must represent the petitioner in solv-

ing the grievances arising out of the application of the provisions of the contract. *They act directly in the interest of the petitioner in carrying out the very purpose of the Act, namely, collective bargaining.*

The exclusions in subsection (3) of Section 2 of the Act support the position of petitioner. Among the exclusions, is "any individual employed as an agricultural laborer." If "employee" includes supervision, and inasmuch as only agricultural *laborers* are excluded from the "*employee*" classification, it would follow that agricultural supervisors are within the Act. This would mean that the Act covered agricultural supervisors and not agricultural laborers, and such a construction would be absurd. The answer must be that the Act does not and was never intended to cover or include any supervision.

Furthermore, it is apparent that the word "employee" in subsection (3) was not intended as including all those who are in the employ of another. Hundreds of thousands of persons employed by others, to-wit: "employees of the United States," the States and political subdivisions thereof, employees of railroads subject to the Railway Labor Act, and labor organizations, agricultural laborers, domestic servants and those employed by their parents or spouse are specifically eliminated by the language of the Act.

The first section of the Act is entitled "Findings and Policy." It will be noted that wherever the term "employee" appears in this Section 1, it is found in conjunction with the terms "wages," "wage earners," "wage rates" and "workers."

Thus Congress stated in its findings and policy that it was concerned solely with "wage earners." That class does not ordinarily include supervisors whose take-home salaries, as found by the lower court, run as high as $500.00 per month (R. 111, 207). Congress used these

words to express their common and accepted meaning. Webster's New International Dictionary defines "worker" as "a laborer; a toiler." Century Dictionary states that: "*Wages* and *hire* are for the more menial, manual or mechanical form of work and commonly imply employment for short periods, as a day or week; *salary* and *stipend* are for more mental forms and imply greater permanence of employment and payment at longer intervals: the *wages* of a servant or laborer; the *salary* of a postmaster or a teacher," and further that, "In common use, the word '*wages*' is applied specifically to the payment made for manual labor or other labor of a manual or mechanical kind."

The position taken by the petitioner is supported by the provisions of Section 9(a) of the Act, where Congress again plainly states that the protection of the Act is for those earning "rates of pay and wages." This subsection reads:

> "Representatives designated or selected for the purpose of collectively bargaining * * * shall be the exclusive representatives * * * for the purpose of collective bargaining with respect to *rates of pay, wages,* hours of employment, or other conditions of employment."

Subsection (5) of Section 2 of the Act in defining "labor organization," states that the term means any organization, etc., in which employees participate, and which exists "for the purpose of dealing with employers concerning grievances, labor disputes, *wages, rates of pay,* hours of employment or conditions of pay."

When Congress in this section used this language in conjunction with the word "employee," it was referring to the rank and file employees because Congress well knew that supervisors are usually salaried persons and that their

salaries are not subject to deduction as is the pay of the "workers" and "wage-earners."

It is pertinent to note that when the word "salary" is used in the Act, it is with reference to the members of the Board (Sec. 4).

It is submitted therefore that the language of the Act is clear and unambiguous and that as applied to the facts in this case, the foremen of the petitioner are not "employees" within the meaning of the Act.

C. IN THE EVENT THERE IS ANY UNCERTAINTY OR DOUBT AS TO WHETHER SUPERVISORS ARE "EMPLOYEES" UNDER THE LANGUAGE USED IN THE ACT, THE INTENTION OF CONGRESS, DETERMINED BY THE APPLICATION OF WELL ESTABLISHED RULES OF CONSTRUCTION, CLEARLY DEMONSTRATES THAT CONGRESS DID NOT INTEND THAT SUPERVISORS WERE TO BE CONSIDERED "EMPLOYEES" UNDER THE ACT.

1. Applicable Rules of Construction

The primary and controlling rule of construction is that the intention of Congress controls. *Re N. L. R. B.*, 304 U. S. 486, 494; *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 255; *N. L. R. B. v. Waterman S. S. Co.*, 309 U. S. 206, 208, 212; *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261.

As stated in *U. S. v. Stewart*, 311 U. S. 60, 69:

> "The meaning of every phrase must be closely related to the time and circumstances of its use."

In *Platt v. Union Pacific R. R. Co.*, 99 U. S. 48, 64, the Court said:

> "* * * in endeavoring to ascertain what the Congress of 1872 intended, we must, as far as possible,

> place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances."

Furthermore, words of a statute should not be so broadly construed that the results will be absurd and unreasonable, because it will not be presumed that the legislative body had any such intention.

It is submitted, therefore, that the construction of the Act, which would include supervision as "employees" is improper because, as the Board said on page 738 of its opinion in the *Maryland Drydock Co.* case, 49 N. L. R. B. 733:

> "* * * The Board would then have to hold in each case that the highest corporate officials, including even presidents and general managers, were entitled to be included in appropriate collective bargaining units, since everyone associated with a corporation, except the stockholders and the board of directors, is an employee. Such a construction of the Act ignores the fact that it was passed against a background of an industrial society in which the vast majority of business enterprises are conducted in the corporate form. While the maxim *inclusio unis est exclusio alterius* is a well established canon of statutory construction, the courts have recognized its limitation, where its application leads to results so absurd as to make it unreasonable to believe that they were intended by Congress."

In *Church of the Holy Trinity v. U. S.*, 143 U. S. 457, the Court was called upon to construe an act of Congress which made it "unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States

* * * under contract or agreement * * * to perform labor or service of any kind * * *" (p. 458). One of the sections of the Act excluded certain classifications from the operation of the Act but not a rector or pastor of a church. The Church made a contract with an alien to bring him into the United States and employ him as its pastor and rector. An action was started to recover the penalty provided in the statute. In holding that the statute was not applicable, the Court said in part (p. 458):

> "It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and service both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind;' and, further, as noticed by the Circuit Judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words,

makes it unreasonable to believe that the legislator intended to include the particular act."

In *Apex Hosiery Co. v. Leader*, 310 U. S. 469, the Sherman Anti-Trust Act (15 U. S. C. A. 1) was involved, Sec. 1 of which provides that "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." Regardless of the word "every" in the statute, the Court said the statute was not applicable to acts of a union and its officers in calling and maintaining a strike to enforce union demands. A contrary holding, the Court said, would mean that "practically every strike in modern history would be brought within the jurisdiction of the federal courts, under the Sherman Act, to remedy law violations" (p. 513), and that it would not give the statute such a ridiculous construction.

In *U. S. v. American Trucking Association.*, 310 U. S. 534, the Court was required to construe the word "employees" in connection with the power of the Interstate Commerce Commission under the Motor Carriers Act of 1935 (49 U. S. C. A. 301). The question was whether the word "employees" used in the Act without qualification, applied to all of the employees of a carrier or only to those employees whose duties affected safety of operation. The Court said its function was "to construe the language so as to give effect to the intent of Congress" (p. 542); that "Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body" (p. 544); and that this must be carefully guarded against; that "it cannot be said that the word 'employee' as used in Section 204 (a) is so clear as to the workmen it embraces that we would accept its broadest

meaning" (p. 545); that "We are especially hesitant to conclude that Congress intended to grant the Commission other than the customary power to secure safety in view of the absence in the legislative history of the Act of any discussion of the desirability of giving the Commission broad and unusual powers over all employees" (pp. 546, 457); and the "Our conclusion, in view of the circumstances set out in this opinion, is that the meaning of employees in Sec. 204 (a) (1) and (2) is limited to those employees whose activities affect the safety of operation" (p. 553).

2. The Preamble of the Act (Section 1) Discloses that Congress did not intend to include Supervision.

The preamble of a statute is said to be the key which opens the minds of the makers of the law. *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550.

Congress found in the first paragraph of Section 1 that the denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining "lead to strikes and other forms of industrial strife or unrest which have the necessary effect of burdening or obstructing commerce * * *" by, among other things, "causing diminution of employment and *wages* * * *."

Congress has plainly stated in Section 1 that it was attempting to remedy a situation which existed in the past and was then existing. This situation dealt with "strikes and other forms of industrial strife and unrest" that burdened and obstructed commerce. There had not been in the past and were not at the time the Act was being considered any strikes of foremen, superintendents, plant managers, general managers or officers of the various com-

panies. Congress could only have had in mind the automobile strikes, steel strikes, coal strikes, etc., of the rank and file workers.

Bulletin No. 651, dated August, 1937, issued by the United States Department of Labor, Bureau of Labor Statistics, in dealing with strikes in the United States from the years 1880 to 1936 makes no mention of strikes by supervisors and discloses that strikes prior to 1935 were by the rank and file workers. It is these strikes which Congress had in mind when the Act was adopted in 1935.

It is evident, therefore, that Congress did not intend to include supervision within the provisions of the Act.

In the first sentence of Section 1, Congress finds that "The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining led to strikes * * *." Foremen had not been asking for recognition when Congress was considering the Act.

It is interesting to note that the Board admits in its opinion *In re Maryland Drydock Co.*, 49 N. L. R. B. 733, that:

> "The legislative history of the National Labor Relations Act indicates that the conditions which prevailed in the mass industries were primarily factors which led to its enactment. In those industries, it was traditionally recognized by all parties that the interests of the foremen lay predominantly with the management groups."

It is also very pertinent to note that in the same opinion, on page 737, the Board states that it was not until the *seventh year of its existence* that it was called upon to decide whether a unit consisting of supervisors was an appropriate unit under the Act.

It is clear from the foregoing that Congress did not have supervision in mind and did not intend that the Act should cover supervision or any other level of management."

3. Subsequent legislative action supports the position taken by the petitioner.

The interpretation of a statute by the legislative department of the government may go far to remove doubt as to its meaning. *First National Bank v. Missouri,* 263 U. S. 640. The amendment or re-enactment of an Act may be resorted to for the discovery of the legislative intent. *Luckenbach S. S. Co. v. United States,* 280 U. S. 173. "Indeed, it has been held that if it can be gathered from a subsequent statute *in pari materi* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." *50 A. Jur. Statutes,* Sec. 377; *Farmers and Mechanics National Bank v. Dearing,* 91 U. S. 29.

In May of 1946 Congress had before it the so called Case Bill (H. R. 4908). This bill expressly amended the National Labor Relations Act by excluding supervisory employees. In introducing the amendment to exclude such supervisors, Senator Ellender stated: (92 Cong. Rec. 5805)

> "Its purpose is to *clarify* the position of the *supervisory employee under the National Labor Act* by explicitly setting forth the intent of Congress to exclude persons vested with *bona fide* supervisory authority from its provisions."

Senator Ellender referred to the decisions of the Board, and stated:

> "The result of this latest decision (*in re: Jones Laughlin Steel Corporation*) is that we are now confronted with the anomalous situation of having a Federal Statute which was enacted primarily for the benefit of the workers being construed so as to permit unions which already represent the workers to become also the legal representatives of the very men whom management has hired to supervise rank and file" (92 Cong. Rec. 5806).

Senator Stanfill, in discussing the amendment stated:

> "Mr. President: When the National Labor Relations Act was made a law everyone regarded foremen as employers or responsible agents thereof, rather than employees, as the terms were used for the purpose of the statute" (92 Cong. Rec. 5158).

The Case Bill containing the above amendment was passed by the Senate (92 Cong. Rec. 5847) and thereafter adopted by the House (92 Cong. Rec. 6036-6057). The act was subsequently vetoed by the President and returned to the House and that body again voted in favor of the act, failing to over-ride the President's veto by a margin of only five votes (92 Cong. Rec. 6798, 6801). A clearer expression of the intent of both the Senate and the House with respect to the inclusion of supervisors under the coverage of the National Labor Relations Act would be difficult to frame.

4. The Legislative History of the Act clearly indicates that Congress did not intend that foremen should be considered "employees."

Legislative history may be considered to determine the intent of Congress. *N.L.R.B. v. Pa. Greyhound Lines*, 303 U. S. 261, 265; *A.F.L. v. N.L.R.B.*, 308 U. S. 401, 408; *N.L.R.B. v. Hearst Publications*, 322 U. S. 111.

In the Congressional debates, members of Congress were discussing means "designed to protect the *laborer*" (Cong. Rec. May 15, 1935, Vol. 9, No. 101, page 7847).

Congressman Wagner stated:

> "Congress determined to fix *wages* and *hours* at a level that might by reemployment and higher pay spread adequate purchasing power among the masses * * *" (p. 7849).

It is further stated (p. 7854):

> "* * * We have cherished always the ideal of employers and *workers* meeting together with free and open minds in order that they may exchange views and arrive at solutions based not upon compulsion but upon mutual concessions and mutual benefits * * * The central idea of all these efforts has been to promote the making of collective agreements between employers and *workers* without exercising any compulsion upon either side * * *."

And again at page 7855, Senator Wagner said:

> "* * * An upright, impartial, and peaceful forum to industry and *labor* will benefit *employers, workers,* and the country at large."

Senator Tydings speaks of "*workingmen*" (p. 7954), and Senator Borah speaks of "a very large body of *workingmen*" (p. 7955).

It is clear from a reading of the record that Congress had in mind the protection of "labor" and the "workingman" and not the protection of supervisory employees such as the foreman level of management in this case. Certainly the record in the instant case would not indicate that the foremen in the light of compensation paid them fall within the "masses" who were at that time thought to require higher pay and increased purchasing power (II, 813). The foregoing intent was further demonstrated

during the debate in the Senate when Senator Tydings proposed an amendment to Section 8 to the effect that coercion "by any person" instead of merely the employer should constitute an unfair labor practice under the Act. During this debate, Senator Barclay, one of the proponents of the Bill, stated:

> "It might be possible for an employee to persuade a fellow employee that he ought to belong to one union or the other, but I cannot understand how a man who is working for wages can go to a man working for the same employer, or for a different employer and intimidate or coerce the other employee to join or not to join a particular union, because *neither one of them can fire the other from his job.*"

This language clearly demonstrates that the Senate did not consider supervisors, such as foremen, as employees within the definition of that word as used in the Act, because foremen, as clearly disclosed by the record in this case, including the foremen of all levels, have the right to fire a worker or to make recommendations in that respect, which are almost universally carried into effect (II, 995; I, 337; 338-340, 611).

Further light upon the intent of Congress is found in the House Committee report upon the Act. (H.C. Rep. No. 1147, 74th Cong.). In this report, there is no mention of supervisory employees but an abundance of comment and reference to many articles dealing with strikes by workers. In this report, the Committee quotes from an opinion by former Chief Justice Taft and says:

> "This statement is a sufficient answer to those who, with questionable disinterestedness, proclaim that rugged individualism is the great boon of the American *workingmen;* or that there is something un-American in the movement by *workers* to pool

> their economic strength . . . While the bill does not require organization along such lines, and makes no distinction between such organizations and others limited by the free choice of the *workers* to the boundaries of a particular plant or employer, it is imperative that employees be permitted so to organize, and that unfair labor practices taking in workers and labor organizations beyond the scope of a single plant be regarded as within the purview of the bill."

Here again the Committee makes it clear that its members are thinking about "workmen" and "workers" and not supervisory employees.

As stated by Judge Simons dissenting from the denial of the petitioner's Motion for Rehearing in the lower court: (R. III, 27)

> "Review of the legislative history of the Wagner Labor Act, the labor literature of the period preceding and following its enactment, and the many decisions interpreting and applying it, leads inescapably to the following conclusions: (1) That the dominant purpose in the minds of its proponents was the fashioning of mechanism by which 'laborers,' 'workers' and 'production men' in the great mass industries, until then impotent, might achieve bargaining power on a parity with the economic power which the development of such industries had lodged in the hands of the employing class; (citing testimony of William Green, President of the American Federation of Labor; Francis Biddle, Chairman of the NLRB under the NIRA; Lloyd K. Garrison, Dean of the University of Wisconsin Law School, first Chairman of the NLRB under under NIRA; Charlton Ogburn, counsel for the AFL; reported in 'Hearings before the Committee on Education and Labor, United States Senate, 74th Congress, 1st Session on S 1958 (1935) U.S. Gov't. Printing Office,' Senator Wagner's discussion of the Wagner Act, 79th Congressional Record

No. 101, p. 7846 *et seq.*, May 15, 1935; Senator Wagner, 79th Congressional Record No. 102 pp. 7949 to 7960, 7967 to 7980, May 16, 1935; Senator Norris, Vol: 79 Congressional Record No. 102, pp. 7949 to 7960, 7967 to 7980.) (2) that prior to and for a substantial period following the enactment, supervisory employees were not identified with the labor movement, were for the most part without labor consciousness, generally considered themselves allied with the employing class and occupying a status above standards needing unionization; (citing The Status of Supervisory Employees under the NLRB. Walter L. Daykin, Associate Professor of Labor Economics, University of Iowa, 29 Iowa Law Review 297. *In re Maryland Drydock Co.*, 49 NLRB 733; *In re Union Collieries Coal Co.*, 41 NLRB 165, dissenting opinion of Gerard D. Reilly.) and (3) that orders of the Labor Board imposing discipline upon employers for violations of the Act stem almost invariably from discrimination, threats, espionage and domination by such supersory employees. (citing: Almost any Labor Board case decided by a Court of Appeals or the Supreme Court of the United States.)

Wherefore, I adhere to the views expressed in the dissent to the decision in the above cause, always keeping in mind that the Labor Act must be construed in the light of the social and economic conditions that brought about its passage, and I would grant the petition for rehearing."

5. Related Legislation supports position of petitioner.

It is a well known rule of statutory construction that a legislative body is presumed to have acted with full knowledge of prior legislation. *Hecht v. Malley*, 265 U. S. 144; *Sutherland Statutory Construction* (3rd Edition), Sec. 4510; 56 *C. J.*, 1008.

In the year 1926, in the Railway Labor Act (46 *U.S.C.A.*, section 151), Congress defined the term "employee" as follows:

> "The term 'employee' as used herein includes every person in the service of the carrier * * * who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission."

This Act was amended less than one year before the introduction of the National Labor Relations Act. If Congress had intended to include supervisors or representatives of management within the definition of an "employee" in the National Labor Relations Act, it would have used appropriate language to that end in the same manner as was done in the Railway Labor Act.

The Board argues that the inclusion of the words "subordinate officials" in the Railway Labor Act is a clear indication of Congressional policy to extend the protection of collective bargaining to this class of employees. There can be no quarrel with this argument as far as the Railway "employees" are concerned because the words of Congress specifically included subordinate officials and Congress apparently felt it was necessary to specifically designate these subordinate officials or they would not be covered by the Act. It is a clear indication that Congress felt that the term "employee," even as used in the Railway Labor Act, was not broad enough to even include "subordinate officials," as otherwise the term would not have been inserted in the definition. The reverse is likewise true. If Congress had intended that levels of management should be included in the term "employees" under the National Labor Relations Act, Congress would have so stated.

The Merchant Marine Act of 1936 (46 U.S.C.A. 1251) passed the year following the adoption of the National Labor Relations Act, provides in Section 1253(c) that the term "employee" means "any person who performs any work as an employee *or subordinate official*. * * *" Congress must have considered that it was necessary to use the words "subordinate official" and not merely "employee" in order to bring any supervision within the provisions of that statute. Attention is also called to the fact that the Merchant Marine Act expressly provides (Section 1252) that the provisions of that Act shall not in any manner be construed to limit, affect, or repeal the provisions of the National Labor Relations Act, but shall be construed to supplement the latter. Thus, it is apparent that Congress had before it the distinction between the term "employee" and "subordinate official," or in other words, the distinction between the worker and management. Otherwise, there would be no reason for Congress to have inserted the words "subordinate officials."

Subsection (6) of Section 1101 of the Social Security Act (42 U.S.C.A. 1301) provides: "The term 'employee' includes an officer of a corporation." This Act was construed in the case of *Deecy Products Co. v. Welch*, 124 F. 2d 592. The Court said in part (p. 595):

> "There is a definite reason why Congress should have enacted Section 1101 (a)(6) even though it is taken to mean that a corporate officer *can* be an employee. In enacting this section, it is more likely that Congress was directing its attention to the real dispute whether a corporate officer was the type of person intended to be protected by remedial state acts rather than any dispute about corporate officers meeting the ordinary employment relationship tests * * * In the absence of Section 1101 (a)(6), it could have been argued that, granting the

> ordinary employment relationship existed with respect to corporate officers, *still these superior employees were not intended to be covered by the Act.* For that reason, Congress might well have felt the necessity of inserting such a section as Section 1101 (a) (6) in the Act *so that it would be clear that the Act covers superior employees as well as inferior employees.*" (Emphasis added.)

Here again in legislation dealing with social problems, Congress specifically enlarged the definition of "employee." It is only reasonable to assume that if Congress had intended to include foremen under the term "employee" in the Wagner Act, it would have evidenced that intent as it did in the Railway Labor Act, the Merchant Marine Act and the Social Security Act.

6. Congress must be presumed to have enacted the statute having in mind the universal rule that an agent will not be allowed to enter into a relationship which may conflict with the interests of the principal.

The law prohibits agents from entering into relationships which might cause or result in a conflict with the interests of the principal. This is true whether the temptation to be disloyal is to the benefit of the agent or others or because by entering into such a relationship the agent will fall under the control of others. The rule is one of the oldest known to the law, is of universal application, and has been stated and restated many times in the strongest terms.

In *United States v. Carter*, 217 U. S. 286, the United States Supreme Court quoted with approval from *Aberdeen Railroad Co. v. Blackie Brothers*, 1 MacQueen's App. Cases 461, as follows:

> "And it is a rule of universal application, that no one having such duties to discharge, shall be al-

lowed to enter into engagements in which he has, or can have, a personal interest conflicting, *or which possibly may conflict* with the interest of those he is bound to protect.

"So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into."

In *Pratt v. Shell Petroleum Co.*, 100 F. 2d 833 (C.C.A. 10) cert. den. in 306 U. S. 659, the Court said:

"It must be held upon plain principles of reason and sound public policy that an agent occupying a place of trust and confidence is not permitted to put himself in a position in which his personal interests may come in conflict with his duty to his principal."

In *Commonwealth Finance Co. v. McHarg*, 282 Fed. 560 (C. C. A. 2), the Court said:

"No principle is better established in the law than that loyalty to his trust is the first duty which every agent owes to his principal. It underlies all agencies. The law condemns as contrary to public policy any conduct in an agent which involves a breach of fidelity in that relationship which is most jealously guarded."

In *Robertson v. Chapman*, 152 U. S. 673, Mr. Justice Harlan, at page 681, said:

"While his agency continues he must act in the matter of such agency solely with reference to the interests of his principal. The law will not permit him, without the knowledge or assent of his principal, to occupy a position in which he will be tempted not to do the best he may for his principal."

In *Glover v. Ames*, 8 Fed. 351, the Court said:

"While acting under this authority (as agent) he could not assume any duty incompatible with the

> interest of his principal, nor act in any transaction where he himself had any adverse interest,"

and quoting from Judge Story's Commentary on Agencies (Sec. 210), added that the rule against divided loyalty

> "is founded upon the plain and obvious consideration that the principal bargains in the employment for the exercise of the disinterested skill, diligence and zeal of the agent for *his* exclusive benefit."

In *Union Cent. Life Ins. Co. v. Berlin*, 90 Fed. 799 (C. C. A. 6), the Court said:

> "The law, on grounds of public policy, demands the utmost loyalty from agent to principal at all times, and does not permit the agent, by reason of his personal interest or otherwise, to assume an attitude in conflict with the very best interests of his principal."

And in *Wadsworth v. Adams*, 138 U. S. 380, the Court said:

> "The law requires the strictest good faith upon the part of one occupying a relation of confidence to another."

The rule applies to every agent, "however limited his authority." *Trice v. Comstock*, 121 Fed. 620 (C. C. A. 8).

It is not wrong-doing, but the possibility of wrong-doing, that calls the rule into operation. As stated in *Stephens v. Gall*, 179 Fed. 938, the rule

> "has its foundation, not so much in the commission of actual fraud, as in that profound knowledge of the human heart which dictated that hallowed petition, 'Lead us not into temptation, but deliver us from evil' and that caused the announcement of the infallible truth that 'a man cannot serve two masters.'"

Or, as stated in *Michoud v. Girod*, 45 U. S. 503, 555:

> "It acts not on the possibility that in some cases the sense of that duty may prevail over the motive of self-interest, but it provides against *the probability in many cases, and the danger in all cases,* that the dictates of self-interest will exercise a predominant influence and supersede that of duty."

No one could successfully contend that a foreman would not violate this rule when he obligates himself to an organization such as the FAA, and subjects himself to its influence, pressure and control. The aims and the principles of the FAA, as hereinafter set forth, will directly conflict with his duty to the respondent to save labor, increase productivity, reward merit, and inspire competition. When foremen unionize they amalgamate themselves into the labor movement and become subject to influence and control by others in this union movement, including the very men the foreman is supposed to supervise and discipline. Once collective bargaining is granted to the FAA even those foremen who do not favor being regimented into a unit will be placed in a position where union pressure may very well overcome their personal desires. Those who favor such an arrangement do so because they desire help for themselves and for their association against the respondent. If the foreman encourages his men to join the UAW-CIO, he may cause the respondent to violate the Wagner Act. The Board in cases of that character, supported by the courts, has always ruled that the foreman is the agent of the company and the company is punished for his acts. Such a foreman would be an unfaithful agent, whether he acted because the UAW-CIO helped his association, or because he hoped the UAW-CIO would support his demands on the respondent, or because the UAW-CIO through pressure on his union dictated his action. If for any of these reasons, he should fail to disci-

pline an official or member of the UAW-CIO or keep on men he did not need, or permit the men to slow down in their work, the wrong would be equally great.

The Board insists, however, that the remedy for disloyalty on the part of its agents "lies implicitly in the power of the company to discipline or discharge them." *Matter of Chrysler Corp.*, 44 N.L.R.B 881; *Matter of Ingalls Shipbuilding Corp.*, 55 N.L.R.B. 113; *Matter of Chrysler Corp.*, 55 N.L.R.B. 220; *Matter of Packard Motor Car Co.*, 61 N.L.R.B. 4.

The Board mistakes the purpose of the rule. The rule of law against divided loyalty was not adopted to punish a wrong but to prevent it. The law does not seek to indemnify principals after disloyalty has resulted in damage. It intends to eliminate the risk of disloyalty by forbidding ties that make it hard for agents to be faithful or easy for them to be unfaithful.

The disloyalty that, under the law, justifies discipline or discharge arises at the very moment when the agent for his own benefit in dealing with the company, affiliates himself with anyone whom he supervises and whose demands upon him as a union man conflict with his acting singlemindedly for his principal.

The power to discipline is, and can be, no solution. It would be impossible for the respondent in this case to police every one of its some 1200 foremen (and 32,000 workers in order to be in a position to know whether or not the foremen were arriving at their decisions because of influence or pressure of the union. As heretofore pointed out, upper management above the foreman level consists of only 76 persons (III, 1815). They are not in a position to know whether or not a foreman is acting in a disloyal manner. Upper management is forced to select in the first instance foremen it believes to be loyal to the

company, and it must of necessity accept the judgment of these foremen in connection with matters involving the rank and file.

The Board points out that the foremen can, without the benefit of the Act, join a union. The Board then further contends that those who do join the union would be subject to the same influences whether or not the union was given the power of collective bargaining under the Act.

The FAA now can claim only to speak for its members. Its officers are therefore not a present in position to assert themselves. If given the right to collective bargaining, it will represent *all* of the foremen. The Act gives the union the right to exclusively represent everyone in the bargaining unit with respect to "rates of pay, wages, hours of employment, or other conditions of employment." The foremen in the unit would be required to subordinate their individual interests to what is deemed best by the union for the collective interests of the group. The Board has so applied the Act, notwithstanding the provisions of Section 9(a) of the Act authorizing the individual to present his grievances to the employer. *Matter of Hughes Tool Co.*, 56 N.L.R.B. 981; *Matter of North American Aviation, Inc.*, 44 N.L.R.B. 604.

Once a representative for the unit has been chosen, even with the slight majority in this case, each member of the unit, whether willing or unwilling, surrenders his individual right to bargain with his employer, and thereafter must deal exclusively with the bargaining agent. *N.L.R.B. v. Knoxville Publishing Co.*, 124 F. 2d 875 (C. C. A. 6); *J. I. Case Co. v. N.L.R.B.*, 321 U. S. 332; *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 311 U. S. 342.

The union is thus given sweeping control which powerfully supplements their control of the members only, and

places the leaders in position to drive any objecting member of the unit into line, and really apply union principles, union coercion, and union pressure.

Even more important is the fact that if the court should hold that foremen are "employees" within the meaning of the Act and force the respondent to collectively bargain with them, management will lose the right which the War Labor Board Panel states it should have "to weigh and determine for itself the appropriate weight to be assigned to merit, ability and seniority" (to which must be added loyalty) in promotions, demotions, transfers and discharges.

One of the most important attributes of an executive is his ability to select the right man for the job. There are many imponderables, many intangibles that enter into the selection of foremen or any member of supervision. The good executive senses who will or who will not be a proper person to fit a particular job. He is like the aviator who "flies by the seat of his pants." In many cases, it would be difficult or impossible for such an executive to specifically list in cold words the reason for his selection of a particular person for a particular job.

Furthermore, when a foreman or any other supervisor is selected, it is essential that there be no question as to his loyalty to the company. The company is in no way concerned with the social activities of members of supervision so long as those social activities do not interfere with their duties. The company is not concerned with any organiaztion an employee desires to join so long as he does not place his loyalty to the organization or the members over and above his duty to the company. When, however, any foreman or any member of the managerial team associates himself with any organization whose principles and whose methods and whose avowed purposes are

contrary to the best interests of the company, then the company must have the right to dispense with his services. The company in such a case should not be required to definitely prove that the particular foreman had actually himself engaged in practices detrimental to the best interests of the company. It must be free to act as soon as a foreman joins an organization whose principles conflict with the interest of the company that the foreman is supposed to foster.

What will happen if the Board's construction of the Act is followed is well illustrated in the case of *Wyman-Gordon Co. v. N.L.R.B.*, 153 F. 2d 480 (C. C. A. 7, Feb. 9, 1946). In that case, the Company had discharged an employee for deliberately producing poor quality war material, for soliciting union membership which interfered with war production, for being a troublemaker, and for conducting himself without the slightest regard for the duty which he owed the petitioner. The Board cited the Company under the Act, claiming that the employee was discharged for union activities, and that this was an unfair labor practice. The Board conceded the employee's misconduct but argued that it did not "seriously" interfere with the work of other employees, that his interference did not cause "serious" loss of production, that he did not cause "undue" spoilage of materials, and that the Company did not prove that the employee was "enormously" delinquent. The Court took the position that any interference, slight or otherwise, damaging to the war effort was serious and any employee who deliberately indulged in such practice should have been discharged forthwith, and further stated that the Company was entitled to be commended rather than criticised for its action in that respect.

The cases of *Interlake Iron Corp. v. N.L.R.B.*, 131 F. 2d 129, and *N.L.R.B. v. Williamson-Dickie Mfg. Co.*, 130 F.

2d 260, also illustrate the absurd lengths to which the Board will go in discharge cases.

If the Court holds with the Board, then in every case where the respondent discharges or demotes foremen, the claim will be made by the Board that the discharge or demotion was discriminatory and based upon the union activities of the foremen affected and will bring an unfair labor charge against the respondent, as in the *Wyman* case, regardless of the merits of the case. As hereinbefore stated, if the petitioner is to properly carry out its function of producing goods, upper management must have the right to say who the managers of the company shall be, and not be in the position where it will be hauled before the Board in connection with every action it is forced to take for its own protection against disloyal foremen.

Certainly Congress did not intend that the Act should be construed to bring about these results. It must have intended that the term "employee" as used in the Act did not include these agents of the company whose undivided loyalty the company must have if in the public interest it is to continue to efficiently function.

7. Construction placed upon the Act by the Board would lead to unreasonable and intolerable results which Congress would never have intended.

The effect of enforced unionism of the foremen upon the foremen, industry, and the country at large is developed under Point II of this brief, and reference is made thereto.

It is the position of the respondent that the effect of such enforced unionism clearly indicates that Congress did not intend that foremen should be considered "employees" under the Act.

8. Court decisions on the question of whether supervisors are "employees" under the Act.

The Circuit Court of Appeals and the Board cite the case of *N. L. R. B. v. Hearst Publications, Inc.*, 322 U. S. 111 as supporting the position that foremen are employees within the meaning of the act. In the *Hearst* case the court had to determine whether Congress intended that the Act should have "uniform national application" (p. 126), or whether "technical legal refinement" (p. 125), differing in the various states as to the distinction between an employee and an independent contractor should prevail. No such question is presented here.

In the *Hearst* case the question was whether newsboys selling newspapers were employees under the act. The court found that these newsboys were, for all intents and purposes, rank and file employees and placed them in the category of "workers" using that word a number of times in its opinion (pp. 125, 126, 130). These newsboys did not have any of the attributes of an employer and in no sense could they be said to be acting in the interest of the publishers directly or indirectly. In the *Hearst* opinion (p. 124) the court said that the question as to who is to be included within the term "employee" "must be answered primarily from the history, terms and purposes of the legislation." It is submitted that it has been demonstrated in this brief that applying the above test, foremen, because of their duties, powers and responsibilities, were not intended by Congress to be considered employees within the meaning of the act. The court emphasized the fact that it was not the intent of Congress to include all service relationships within the act: "It cannot be taken, however, that the purpose was to include all other persons who perform services for another or was to ignore entirely legal classifications made for other purposes." (p. 124);

"Congress had in mind * * * a narrower field than the entire area of rendering service to others" (p. 124); and "myriad forms of service relationships * * * blanket the nation's economy. Some are within this Act, others are beyond its coverage" (p. 126).

It is submitted therefore that the *Hearst* case not only does not support the position taken by the Circuit Court of Appeals and the Board in this case, but on the contrary supports the position taken by the petitioner. See *N. L. R. B. v. E. C. Atkins Co.*, 147 F. 2d 730.

In its opinion in this case the Circuit Court of Appeals cites decisions of other courts as authority for the position that foremen are employees within the meaning of the act. It is pertinent to note that in none of these cases was this question a major issue and that the so-called supervisors involved were not in the front line of management as in this case.

In the *N. L. R. B. v. Skinner and Kennedy Stationery Company*, 113 F. 2d 667 (C. C. A. 8) the board found that the Company had discharged a person named Eckert, an alleged foreman, because he had joined the A. F. of L. rank and file union and ordered him reinstated. The case was taken to the Circuit Court of Appeals for the Eighth Circuit and the court adopted an early statement of the board to the effect that "a foreman in his relations to his employer is an employee, while in his relationship to the laborers under him he is a representative of the employer within the definition of Section 2 (2) of the act." It should be noted that in the Board's "Decision and Order" in this case (13 N. L. R. B. 1186) no claim is apparently made in the employer's answer to the Board's Complaint that Eckert was a supervisor and not covered by the act. As stated the Board stated on Page 1193 of its "Decision and Order," it was not until the oral argument before the board that counsel for the employer made this point.

The employer in the Skinner case was engaged in general commercial printing (P. 1188 of the board's opinion). Eckert was foreman of the cylinder press roll (P. 1192), and the labor organizations involved were the typographical unions (P. 1189). These unions for years have admitted formemen as well as printers to their membership and have a history of collective bargaining for foremen in a unit containing the rank and file. The typographical and maritime unions and their members were made an exception by the board even in the *Maryland Drydock* case, *supra*.

Member Riley in his dissenting opinion in the instant case said (R. III, 1834):

> "For one thing, only two of these industries—the printing and maritime trades—even fall within the scope of the National Labor Relations Act, and the pattern of collective bargaining established in them grew up quite independently of this statute and in some respects is quite contrary to its basic concepts. Because of the traditions of the sea, implemented by the admiralty laws, there is little danger of the officers and crew merging their respective labor organizations. In the newspaper field, where the foreman is traditionally a member of the Printers' Union, the composing room staff operates almost as independently of the publisher as would be the case if the work was done by a job printing establishment. Then again, in none of the enumerated industries is this country particularly unique, and the technological developments in these fields in recent years have been relatively minor. An entirely different spectacle is presented by the mass production industries, where the constant development of technological science, with the resultant subdivision of labor operations, requires constant attention in the coördination of production with supervisory and engineering techniques. It is these industries which have made this country the

foremost industrial nation of the world and contributed so heavily to war production, and it is in these industries that the basic principles of the National Labor Relations Act have been most frequently applied. It therefore seems to me that we may well be forcing these industries and their employees into a Procrustean bed when we project upon them practices which have grown up in entirely unrelated fields."

The opinion of the court in the Skinner case concludes "nothing in the act *excepts* foremen from its benefits nor from protection against discrimination nor unfair labor practices of the master." With all due respect to the court it is submitted that the question was not whether the act "*excepts*" foremen, but rather does the act *include* foremen. It has been demonstrated in this brief that the act does not "include" foremen.

Furthermore, it does not appear in either the Board's opinion or that of the Circuit Court of Appeals that Eckert's duties were such that he could be said to be in the front line of management as the foremen in the instant case were found to be by the lower court.

In the *Eagle-Picher Mining and Smelting Company v. N. L. R. B. case*, 119 F. 2d 903 (C. C. A. 8) the court found that a man named Sheppard was discharged for union activities. The employer contended that Sheppard was an executive and the court held he was an employee within the meaning of the act. It further appears that Sheppard was really only a "working supervisor" (P. 911). It does not appear from the court's decision that the arguments presented in this brief were presented to the court in the *Eagle-Picher* case.

In the case of *N. L. R. B. v. Star Publishing Company*, 97 F. 2d 465 (C. C. A. 9) neither the opinion of the court nor the opinion of the Board (4 N. L. R. B. 498) shows that

the claims made were that the supervisors were not within the protection of the act. Here again the printing and publishing trade was involved and it appears that the duty of the so-called branch manager involved consisted merely of taking newspapers from the newspaper plant to the newsboys in the territory and instructing them with respect to delivery.

In the case of *N. L. R. B. v. American Potash and Chemical Corporation*, 98 F. 2d 488 (C. C. A. 9) a foreman was demoted but the opinion did not indicate that the employer claimed that a foreman is not protected by the act. Neither does this contention appear in the Board's "Decision and Order" (3 N. L. R. B. 140).

In the case of *Hazel-Atlas Glass Company v. N. L. R. B.*, 127 F. 2d 109 (C. C. A. 4) the Company discharged a foreman named Carder who had refused to carry on his duties when the workers struck. The court refused to enforce the part of the Board's order which required Carder's reinstatement because the court concluded that he had not been discharged for union activities. The question of whether Carder was or was not an employee within the meaning of the act is therefore not essential to the decision in the case.

In the case of *N. L. R. B. v. Armour & Company*, 17 L. R. R. 372 (C. C. A. 10) foremen were not involved. This case dealt with plant clerks, and is therefore not in point.

In the instant case the lower court says that "The sweeping character of the definition (of employer) is explained by the fact that Congress evidently thought the employer must be held responsible for any effort of the supervisors to destroy collective bargaining." The court thus admits that the definition of an employer in the Act does include supervisors. It cannot, however, be conceded that Congress used the language solely for the purpose of

holding the employer responsible for the acts of supervisors. It is a well recognized principle of law that an employer is ordinarily bound by the actions of his supervisors and no such statement would be required in the act. Congress therefore did not use the language in question for the purpose indicated by the court, but rather to include supervision on the employer's side of collective bargaining and not on the employees' side.

It is submitted therefore, that decisions relied on by the Board and lower court on this question have little or no weight as precedents and that insofar as they indicate that foremen in the mass production industries are "employees" within the meaning of the act, they should not be followed.

In the case of *N. L. R. B. v. E. C. Atkins and Company*, 147 F. 2d 730; 155 F. 2d 567, the Circuit Court of Appeals for the Seventh Circuit held that militarized guards were not employees under the act. This case was carried by the Board to the Supreme Court. Subsequently, the plant guards were demilitarized and the Supreme Court remanded the case to the Seventh Circuit for further consideration. The Seventh Circuit (155 F. 2d 567) held that the demilitarization of the guards made no difference and affirmed its previous decision denying the boards enforcement order. The court said (P. 567-568):

> "We formerly refused to enforce the Board's order on the ground that, since the alleged employees (plant guards) were militarized, they were not employees of respondent within the meaning of § 2(3) of the National Labor Relations Act, 29 U. S. C. A. § 152(3). Alternatively, we held that even if the guards, despite their militarized status, be considered employees of respondent, enforcement of the Board's order 'should not be allowed * * * (because) to do so would be or is likely to be inimical to the public welfare.'

> "We have considered the facts relative to the changed status of the plant guards by reason of their demilitarization and are of the opinion that they are irrelevant to the issues which we have heretofore decided adversely to the Board. Certainly such is the case with reference to our decision that the plant guards were not employees of respondent within the meaning of the Act. In fact, the irrelevancy of the changed circumstances as to this issue is conceded by the Board. We are urged by the Board, however, to reverse our former decision and to hold that the plant guards were employees. We have also given this matter further consideration and are of the opinion that our former decision in this respect was correct, and we reaffirm it."

If plant protection guards are not employees within the meaning of the act, certainly the foremen of the petitioner who exercise more power, have more responsibility and are much more important to management are not employees within the meaning of the act.

POINT II

THE CIRCUIT COURT OF APPEALS AFTER HOLDING THAT THE GENERAL FOREMEN, FOREMEN AND SPECIAL ASSIGNMENT MEN OF THE PETITIONER WERE "EMPLOYEES" WITHIN THE MEANING OF THE NATIONAL LABOR RELATIONS ACT, ERRED IN HOLDING THAT THE BOARD COULD PROPERLY INCLUDE SUCH "EMPLOYEES" IN ANY UNIT FOR THE PURPOSE OF COLLECTIVE BARGAINING

Section 9(b) of the Act reads as follows:

> "(b) The Board shall decide in each case whether in order to insure the employees the full benefit of their right of self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit or a subdivision thereof."

A. Power of the Board to exclude supervisors from any bargaining unit.

In the Memorandum for the Board filed in this Court in connection with the petitioner's Petition for a Writ of Certiorari, the Board states that it will urge upon this Court that the Board is without power to deprive supervisory employees of statutory rights by holding that such employees could not constitute an appropriate bargaining unit.

The Board had consistently held prior to its decision in *Matter of L. A. Young Spring & Wire Corp.*, 65 N. L. R. B. 298, decided January 8, 1946, and subsequent to its decision in the instant case, that Section 9(b) conferred upon the Board administrative discretion, not only to determine which of the several units mentioned in the Section would be appropriate, but also to decide that some employees could not constitute an appropriate unit in any circumstance. The Board in the *Young* case reversed itself and said: "We are now persuaded that this interpretation is unjustified and should not govern future Board Rulings."

The Board said further:

> "Under the power to define the unit, the Board may properly insist that foremen be organized in bargaining units apart from their subordinates, but it cannot ostracize them. In this view, the kind of industry in which foremen are employed is immaterial, and the duties and responsibilities of foremen are relevant only insofar as they bear on the question of proper grouping for collective bargaining purposes."

As noted above, the Board in the *Matter of Jones & Laughlin Steel Corp.*, 66 N. L. R. B. 386, decided subsequent to the decision in the case now before the Court,

and on March 7, 1946, held that in view of the "full freedom" granted by the Act in the selection of representatives by employees, it was powerless to deny supervisors the right to be represented by any *bona fide* labor organization, whether affiliated or unaffiliated with a rank and file union.

This Court has not directly passed upon this question. In the case of *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 146 F. (2d) 718, the Sixth Circuit Court held that while the Board may have properly determined that militarized plant guards were "employees" within the meaning of the Act, that nevertheless, the Board could not stop with its findings upon the facts that the plant protection employees are entitled to the benefits of collective bargaining. It is required under Section 9(b) to determine whether the unit or units selected for that purpose would effectuate the policies of Sections 151-166 of this title * * *." The Court further stated: "The Board, under Section 9(b), had a positive duty to perform in the interests of the public." The Court then denied enforcement of the Board's order on the ground that the Board had abused its discretion in certifying a rank and file union as the collective bargaining representative for plant guards, saying:

> "When they were inducted into unions and became subject to their orders, rules, and decisions, the plant protection employees assumed obligations to the unions and their fellow workers which might well in given circumstances bring them in conflict with their obligations to their employers. * * *"

The Court also stated:

> "We think the imposition of such strains upon personal allegiance and personal interest would undoubtedly be detrimental to the public interest and to the free flow of commerce."

In the case of *N. L. R. B. v. E. C. Atkins & Co.*, 147 F. (2d) 730 (C. C. A. 7), the Board sought to enforce its order that the Company bargain with a rank and file union as the representative of the plant guards. The court in that case determined that militarized plant guards were not "employees" of the company under the Act and denied enforcement of the order. The court said on the matter of appropriate units:

> "The purposes and policy of the National Labor Relations Act are well known and need not here be dwelt upon. The Board must comply with the requirement 'that the unit selected must be one to effectuate the policy of the Act, the policy of efficient collective bargaining.'"

The Board appealed these decisions to the United States Supreme Court, and while the cases were pending in that Court, the plant guards were demilitarized and that fact was brought to the attention of this Court. This Court thereupon "remanded to the respective Circuit Courts of Appeal for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof on the Board's orders."

In the *Jones & Laughlin* case, *supra*, the Sixth Circuit Court of Appeals (154 F. (2d) 932) on the remand again denied the Board's application for enforcement of its order requiring the Steel Company to collectively bargain with the plant guards.

The Seventh Circuit Court of Appeals in the *Atkins & Co.* case also again denied the Board's application for enforcement of its order (155 F. (2d) 567). The Court said in connection with the denial of the order:

> "We are urged by the Board, however, to reverse our former decision and to hold that the plant

> guards were employees. We have also given this matter further consideration and are of the opinion that our former decision in this respect was correct and we reaffirm it."

On the question of certification, the Court said:

> "Although we are doubtful that the facts concerning the demilitarization of the plant guards and their alternative holding that the enforcement of the Board's order 'would be or is likely to be inimical to the public welfare,' there is no necessity for decision on our part in this respect. This is so for the reason that the latter issue is immaterial in view of our decision that the plant guards are not employees."

The duties and responsibilities of plant guards, as set forth in the *Jones & Laughlin* and *Atkins & Co.* cases, are similar in certain respects to the duties and responsibilities of the foremen except that the foremen's duties and responsibilities are much greater and of much more importance to management.

It would seem that if the Board is correct in construing the Act to include in its coverage every person who receives compensation for services rendered to a corporate employer, then the board must have the discretion to determine whether or not it would be necessary in order to effectuate the purposes of the Act to exclude some of such employees from any unit, as the Board did in the *Maryland Drydock* case. Otherwise rather absurd results would follow. For example, under the Board's construction of the Act the vice presidents of a corporation would be employees—so would the president. On proper petition the Board, pursuant to its decision in *Spring & Wire Corp.* case, would be required to place these employees in a unit for collective bargaining purposes, and to be consistent with the instant case would have to include

the president in the same unit with the vice-presidents he supervised, as the Board in case included the general foremen in the same unit with the foremen they supervised. The result would be that the president and vice-presidents might well be not only members, but also officers of the union which would be representing them, and thus would be required as representatives of the corporation to collectively bargain with themselves over their rates of pay, working conditions etc. It is rather difficult to believe that Congress intended such a result.

It must follow, therefore, that Congress either intended that the Board should have the discretion to refuse to place levels of management in a unit for collective bargaining, or if the language of Section 9(b) does not permit such a construction, then that Congress did not intend that supervisory employees were to be considered employees under the Act, and that the Act was really intended, as the language clearly indicates, to protect the "worker," the "laborer," and the "wage-earner."

The Board in the Memorandum mentioned above takes the further position that if it does have discretion to exclude employees from any unit, it properly exercised that discretion in the instant case.

B. The Court should review the action of the Board on this issue.

The authority given to the Board by the Act must be reasonably exercised. The Court in the case of *Southern S. S. Co. v. N. L. R. B.*, 316 U. S. 31, had this to say with respect to the discretion of the Board:

> "This authorization is of considerable breadth, and the courts may not lightly disturb the Board's choice of remedies. But it is also true that this discretion has its limits, and we have already begun to

define them. *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 59 S. Ct. 490, 83 L. Ed. 627, 123 A. L. R. 599; *Republic Steel Corp. v. National Labor Relations Board*, 311 U. S. 7, 61 S. Ct. 77, 85 L. Ed. 6. A complete definition of course was not and could not have been attempted in these cases. Nor will it be attempted here. It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."

This Court in the case of *N. L. R. B. v. Jones & Laughlin*, 301 U. S. 1, said:

"* * * The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation. * * *"

See also: *Pittsburgh Plate Glass Co. v. N. L. R. B.*, 113 F. 690 (affirmed 313 U. S. 146); *Midland Steel Products Co. v. N. L. R. B.*, 113 F. (2d) 800 (C. C. A. 6); *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 146 F. (2d) 718 (C. C. A. 6).

The Board acts in a public capacity and in the public interest. *National Licorice Co. v. N. L. R. B.*, 306 U. S. 360, 362; *Amalgamated Workers v. Edison Co.*, 309 U. S. 261, 265.

The members of the Board have been unable to agree whether supervisory employees could constitute an appropriate unit for collective bargaining. The majority of the Board has reversed and re-reversed its findings and determinations on this question. There has not been one unanimous decision. This issue was first presented to the Board in the *Matter of Union Collieries Co.*, 41 N. L. R. B. 961, decided June 1, 1942, and the Board, one member dissenting decided that supervisors could be placed in a unit for collective bargaining purposes. On May 11, 1934, in the *Matter of Maryland Drydock Co.*, 49 N. L. R. B. 733, the Board, one member dissenting, reversed the *Collieries* case and held that supervisory employees did not belong in collective bargaining units, and later dismissed petitions for representation of foreman units in *Matter of Boeing Aircraft Co.*, 51 N. L. R. B. 67; *Matter of Murray Corporation of America*, 51 N. L. R. B. 95, and in *Matter of General Motors*, 51 N. L. R. B. 457, which involved the same so-called independent union in this case. In the instant case the Board, one member dissenting, reversed the *Drydock* case and held that foremen could be placed in a unit for collective bargaining if the unit was represented by a union not affiliated with the rank and file union, and that it was proper and appropriate to include in the one unit the general foremen, foremen, and assistant foremen, thereby reversing two previous cases, *Matter of Boeing Aircraft Co.*, 45 N. L. R. B. 60, and *Matter of Murray Corporation of America*, 47 N. L. R. B. 1003 in both of which cases the Board had held that it was inappropriate to include in one unit of supervision general foremen, foremen and assistant foremen, because it was not proper to include in one unit supervisors and those supervised. As noted above, the Board in the *L. A. Young Spring & Wire Corp.* case, *supra*, then reversed itself again and ruled that it did not have the power to decide

that some "employees" may not constitute an appropriate unit in any circumstance, and that therefore the kind of industry in which foremen are employed is immaterial and the duties and responsibilities of foremen are irrelevant only in so far as they bear on the question of proper grouping for collective bargaining purposes. The Board then held in the *Matter of Jones & Laughlin Steel Corp.*, 66 N. L. R. B. No. 51, decided March 7, 1946, and reversing in part the present Packard case, that a foremen's unit could be represented by union of the rank and file workers who were supervised by the foremen.

Chairman Herzog of the Board frankly admits that the Board is uncertain as to the correctness of its decision in the Packard case. He appeared at the Hearings before the Subcommittee of the Committee on Education and Labor of the United States Senate on H. R. 4908 (Case Bill), on February 28, 1946. The Bill provided, as noted above among other things, that supervisory employees, such as the petitioner's foremen, should not have the status of an "employee" for the purposes of Sections 7, 8 and 9 of the National Labor Relations Act.

Mr. Herzog told the Committee (p. 333):

> "The Packard case, which found that the Foreman's Association of America could bargain for the Packard Company foreman is now on its way through the courts, which will tell us during 1946 whether we were right or wrong in construing the statute as we have.
>
> "No one could be more aware of the difficult problems which are presented by this issue than are the three members of the Board: As I said in a concurring opinion in the second Packard case, the issue 'cannot be analyzed in terms of black and white. They present a study in grey.'"

The language of the court in the case of *Wyman-Gordon Co. v. N. L. R. B.*, 153 Fed. 480, is quite pertinent:

> "We realize that the findings of the Board must be accepted if substantially supported, notwithstanding that one member dissented and approved the recommendations of the Trial Examiner, which the majority of the Board refused to follow. We think, however, that such contrariety of views may be properly taken into consideration, in fact, that it has a material bearing upon the question as to whether the Board's findings are substantially supported."

The court then proceeded to make a complete investigation of the facts and findings and reversed the Board.

Based upon the uncertainty of the Board as set forth above; the fact that its own members cannot agree; the fact that the Board is apparently not too convinced of the correctness of its own decisions, and because of the importance of the issues involved, it is submitted that the Court may, and should make a full and complete investigation of the findings and determinations of the Board that foremen constitute an appropriate unit under the Act. The Court, it is respectfully submitted, should accept Chairman Herzog's invitation to determine whether the Board "was right or wrong in construing the statute as we have" and should not, in light of the history of this issue before the Board, feel constrained to accept any of the Board's findings or determinations because of any presumed specialized experience or expert knowledge of the majority members of the Board.

C. It was contrary to Public Interest and the General Policy of the Act, and therefore an abuse of discretion on the part of the Board to include the foreman level of management of the Petitioner in an appropriate unit under the Act.

1. The opinions of the Board on this issue.

The issue, as noted above, was first presented to the Board in the *Matter of Union Collieries Co., supra.* In this case, the Board ruled, Member Reilly dissenting, that foremen were employees within the meaning of the Act and that assistant foremen, fire bosses, weigh bosses and coal inspectors constituted an appropriate unit for collective bargaining.

Member Reilly filed a vigorous dissent, saying in part (pp. 971, 972):

> "* * * in our appraisal of factors entering into the conception of the word 'appropriate,' it is important to consider the possible impact of this decision upon the general policy of the Act."

Mr. Reilly also pointed out that a representative of the United Mine Workers who appeared at the oral argument of that case had indicated that if the Board extended the benefits of the Act to supervisors, the mine workers would probably seek to represent such persons in future negotiations with their employees. From this, Mr. Reilly argued that "even with the establishment of separate bargaining units, to have the same representative for supervision as for rank and file would result in a separation 'more theoretical than real'." He refers to the danger of organizational rivalry and the effect on the rule that an employer is responsible for interference by his supervisors with rank and file organizational activity. A supervisor promoting the interests of his union might well coerce, and impair the freedom of choice of his subordinates. Mr. Reilly concludes that even conceding the

position of the supervisors would be benefited by "effectuating their right to collective bargaining * * *" it seems to me that this is outweighed by the possible impingement upon the similar right of the greater number." (p. 972.)

On May 11, 1934, in the *Matter of Maryland Drydock Co., supra,* and while a movement was under way in Congress to enact legislation which would specifically prohibit foremen from joining unions for the purpose of collective bargaining as permitted by the *Collieries* case, the Board reversed the *Collieries* case and ruled that, except in industries having an established history of unionization of foremen, such as the printing trades, supervisory employees did not belong in collective bargaining units, and that the Board would not establish such units or certify unions that purported to represent foremen. The majority said:

> "We are now persuaded that the benefits which supervisory employees might achieve through being certified as collective bargaining units would be outweighed not only by the dangers inherent in the commingling of management and employee function, but also in its possible restrictive effect upon the organizational freedom of rank and file employees. It is not necessary to elaborate at length on each of these points."

The Board then points out that even in its earlier cases it recognized the danger inherent in the organization of supervisors, and sought to protect the ordinary employees by refusing to sanction the establishment of bargaining units containing both supervisors and their subordinates. The Board said further in that connection:

> "We are not convinced, however, that this measure affords adequate protection of the rights of the vast bulk of employees, whom the Act was specifically designated to protect. For, although super-

visors may nominally constitute a separate bargaining unit, it is clear that they may—as they did in the case at bar—affiliate with and designate as their representative the same union which represents their subordinates."

The Board also said:

"* * * We are of the opinion that in the present stage of industrial administration and employee self-organization, the establishment of bargaining units composed of supervisors exercising substantial managerial authority will impede the processes of collective bargaining, disrupt established managerial and production techniques, and militate against effectuation of the policies of the Act."

The Board then found that foremen as agents of management acted in a fiduciary capacity and that the National Labor Relations Act should not be so construed as to bring about a repudiation of the prohibition of the common law against fiduciaries serving conflicting interests, and then said:

"* * * imputation to management of liability for the conduct of its supervisors arises not from the mere inference that foremen reflect company policy but also by virtue of the fact that full-fledged supervisors constitute management in the eyes of their subordinates."

The Board on July 20, 1943, in the *Matter of the General Motors Corporation* (Detroit Diesel Engine Division) and *Foreman's Association of America*, 51 N.L.R.B. 457, dismissed the petition of the union which is involved in the instant case on the ground that unit of foremen was not an appropriate unit within the meaning of Section 9(b) of the Act. The Board in that case specifically found that the fact that the union seeking to represent the supervisory employees was an independent labor organization

not affiliated with the union which represented the production and maintenance workers did not obviate "the factors militating against the establishment of units of supervisory employees, set forth in our decision in the *Maryland Drydock* case."

Then the Board in the present case, Member Reilly dissenting (R. III, 1791), decided March 26, 1945, reversed the *Drydock* case. The majority of the Board attempts unsuccessfully to explain its reversal of the *Drydock* case and makes the startling statement that since that case "we have observed with concern the important development in the field of foreman organizations which are fully set out in the record before us, and which, we believe, requires a reconsideration of the entire problem."

A diligent search of the record will fail to disclose just what these important developments were that in eighteen months' time would persuade the Board that it was wrong in holding in the *Drydock* case that benefits to supervisors "would be outweighed not only by the dangers inherent in the commingling of management and employee functions, but also in the restrictive effect upon the organizational freedom of the rank and file employees" and "would be to view the statute as repudiating the historic prohibition of the common law against fiduciaries serving conflicting interests."

True, there had been a strike of the FAA which curtailed production of important and needed war materials (R. I, 233), but this would not seem to be a sufficient reason to overrule fundamental principles. As a matter of fact, as pointed out by Member Reilly in his dissenting opinion (R. III, 1830), the files of the Board show that in most of the strikes which had occurred during the war period, the organizations involved were unions which had the right to use collective bargaining. He pointed out that the Ninth Annual Report of the Board (p. 7374) dis-

closes that the bulk of strike notices seem to arise from dissatisfaction with the decisions of some Government agency, and that it was, unfortunately, no novelty to have disgruntled unions strike and interfere with production because the Board had refused to recognize units which they proposed as appropriate.

The effect of the Board's decision in the instant case is well stated by Member Reilly in his dissenting opinion:

> "In my opinion, the decision we are making today does irreparable damage to the delicate balance between the conflicting interests of management and worker which the National Labor Relations Act sought to bring about in American industry. From the very beginning of the administration of this Act, the Board has recognized that in mass production industries, the interests of foremen lay predominantly with management groups."

2. The application of Union principles to any part of management would be against the public interest and the policy of the Act.

The leaders of the FAA in this case stated very definitely that the FAA believed and would apply the same union principles as the CIO (R. I, 384, 546). The application of these principles would conflict with a proper performance by the foremen of their managerial duties. The result would be:

(i) *Splitting of the ranks of management*

The first objective of union leaders is to engender and foster in the employees a feeling of hostility against the employer. The employer becomes the hydra-headed monster which the union leaders must battle. This objective is accomplished by unsupported accusations of unfair treatment, improper discharges, promotions and demo-

tions. It follows a pattern that is apparently based upon the philosophy that an untruth or a series of untruths repeated often enough will finally be accepted as the truth.

Once the organization is formed, it must be kept intact and the same procedure is followed.

The leaders of the FAA have followed this procedure religiously and consistently. The president of the FAA delivered 39 organizational radio addresses in Detroit between February 24, 1943 and May 25, 1944 (R. III, 1536-1750). They were typical organizational speeches and full reign was given to extravagant, unsupported and unsupportable statements.

Thus, in his radio address of April 7, 1943 (R. III, 1570), Mr. Keys said: "We wonder if our employers realize they are doing Hitler a favor by attacking our right to bargain for a square deal." In his speech of April 14, 1943 (R. III, 1575), Mr. Keys accuses American business of a disregard of human rights and of a crushing of the weak by the strong. In his speech of December 9, 1943 (R. III, 1614), he accuses industry of "exploiting" the foremen. In his speech of December 23, 1943 (R. III, 1623), he stated: "The higher corporate profits mounted, the greedier plant ownership became, to the point where management sat up nights figuring out new schemes to increase production at the expense of the workingman." In the speech of January 6, 1944 (R. III, 1639-40), he refers to "that unsavory attempt on the part of General Motors and other corporations to legislate away constitutional rights for some five million foremen in America." In the speech of March 2, 1944 (R. III, 1680), he stated that under present conditions: "Any addle brain or prejudiced plant manager can make a scapegoat out of supervisor by discharging him in order to cover up his own managerial mistakes; or to satisfy a personal dislike;

or because he thinks it clever to make an example of a foreman or two for the express purpose of intimidating other foremen in the plant." In his speech of May 1, 1944 (R. III, 1730), he stated that management had proven by their actions during the past few years that "they are absolutely determined to retain the questionable privilege of continuing to exploit us in every conceivable manner. They have done everything to exploit us in every conceivable manner."

The same theme is stressed in every one of the 39 radio addresses.

This sort of propaganda will split the ranks of management and seriously disrupt the relationship between the upper management and the foreman level.

(ii) *Divided loyalty*

Mr. Traen, a general foreman and the President of Packard Local No. 5 of the FAA, testified that loyalty to the Union and its members was a principle of unionism; that the principle of "one for all and all for one," as among union members, applied (R. I, 384), and that the word "fidelity" in the emblem of the FAA meant faithfulness and concern for the interest of the members (R. I, 385).

Foremen act for and as representatives of management and their loyalty must be to management. The unionization of the foreman can only result in divided loyalty (R. II, 1049). Management would never know how the indoctrinated union foremen would act in the given situation (R. II, 1049). His duty to management might lie in one direction and his union interest, and the pressure of his union group that he may feel unable to resist, might pull him in another direction. Management could not know if a foreman making a decision considered the wel-

fare of the company or of his union and consequently would not be able to rely upon the decisions or on the recommendations of such foremen. The important and key functions for management now performed by foremen could not be discharged properly under such a condition (R. II, 1050).

To be more specific, management could not rely on the foremen to properly enforce discipline, to require the workers to perform a full day's work or to keep the costs down by avoiding loafing and surplus help (R. I, 1052-1053). Management would not know whether the desire of the foremen to secure the assistance of the workers' union when needed would cause him to be lax in discipline or in the carrying out of his duties and functions (R. II, 1052-1053). The foremen could no longer be management's representative in the first stage of the grievance procedure. This responsibility would have to be given to someone whose individual loyalty was to management (R. II, 1053).

In the event the C. I. O. or the A. F. of L. or some other union organization attempted to organize the foremen of *Packard* after the Foreman's Association had been given the right to collective bargaining, a fight would develop which would create confusion and slow up production (R. II, 1054-1055). Mr. Traen, stated emphatically that he would fight the organization of a rival foreman's union (R. I, 573). He admitted that it would not be impossible for a rival union to be formed (R. I, 575).

If foremen were members of the same union along with the workers, no reliance could be placed by management upon their recommendations or actions with respect to the workers (R. I, 575). The leaders of the workers' union are interested in keeping their members employed and are constantly making demands in that respect with no regard for cost (R. II, 1050).

If a general foreman were a member of the FAA and a foreman under him was a member of a rival association, management could not rely upon the general foreman's recommendations with respect to his foremen (R. II, 1057-1058) because his loyalty to his fellow members in the FAA and to the FAA or the pressure of the FAA would have a tendency to affect his judgment (R. II, 1058). A foreman should operate as an individual. He is in reality a manager of a small group and is in competition with his other foremen, this competition is necessary if the standards of the product are to be maintained (R. II, 1059).

(iii) *Majority rule*

Under union principles it is the majority of the union that would control the actions of its members. Mr. Traen, the President of Local No. 5 in discussing the FAA strike had this to say (R. I, 389):

> "Q. Did you attempt to stop it (the Packard foreman's strike)?
>
> A. Yes.
>
> Q. And you were unsuccessful?
>
> A. Very much so.
>
> Q. What attempt did you make to stop the strike?
>
> A. My attempt to stop the strike was prior to the vote. In fact, it was my intention to even stop the vote. I was flatly told that if I continued the way I was I was going to be recalled immediately.
>
> Q. In a case of that sort it would be the majority that ruled and they could recall you if they did not like what you did?
>
> A. Yes.
>
> Q. And that would go to any action your chapter might take. The majority would control?
>
> A. Yes.
>
> Q. And the majority in this case voted to strike, even though you did not want to strike?
>
> A. Yes.

Q. And you had to go along with the majority?
A. Yes."

Mr. Turnbull, a general foreman and the Secretary of Local No. 5 testified that if a majority of the members were out on strike the other members would have to join the strike even though they did not agree with the action taken and that if an officer of the Association opposed a strike too violently he might be recalled (R. I, 547).

The following testimony of Mr. Wilkins, one of the foremen witnesses, is very illuminating on the matter of the operation of union principles (R. I, 727-728):

"Q. (By Mr. Dahling): You stated, did you not, that if you had a brother member of the Foreman's Association who was assistant foreman in your department and you felt that he was incompetent and was not working properly you would recommend his removal from the roll, did you not?

A. The first thing we do is take that up with the Board.

Q. When you say the 'Board,' what Board?

A. Of the union.

Q. The Board of the Union?

A. Yes.

Q. That is the Foreman's Association of America?

A. That is right.

Q. What do you do at this Board meeting?

A. We state,

Q. (Interposing): When you take the matter up with the Board?

A. We state our case right in front of all the men on the Board.

Q. You state your case and take the matter up with the Board?

A. My case? In other words, the man's case, what he is able to do, what is wrong with him and let them be the judge.

Q. And then we will say that they vote that you are correct in your analysis of the situation and the man should be removed from the roll, what do you do then?

A. Recommend or suggest to the superintendent.

* * * * *

Q. Well, we will say that the majority of the FAA think that a man is competent but you still think that the man is incompetent and want him discharged and the Company goes ahead and discharges him and then the Foreman's Association strikes because of that, would you go out on that strike?

A. I would have to."

Mr. Keys, the President of FAA likewise took the position that if a general foreman discharged an incompetent assistant foreman believing this action to be in the best interests of the Company and the Foreman's Assoication went out on strike because of the discharge the general foreman responsible would be expected to participate (R. I, 758).

He further stated that if the general foreman felt that the strike was unjustified and should attempt to cross the picket line established by the Association, he would be stopped. That a picket line was formed for the purpose of stopping production (R. I, 759-760). He also stated that it would be a serious offense against the Union for a foreman to instist upon working when the Association was ont on strike and would be a violation of union principles (R. I, 760).

How can management function properly if the action of foremen is to be dictated by a union? Did Congress intend such a result?

(iv) *Seniority would control promotion*

A cardinal principle of unionism and of the FAA is seniority (R. I, 384, 544). Mr. Turnbull, one of the officers of the FAA Local at Packard on this matter of seniority testified as follows (R. I, 568-570):

> "Q. Now, Mr. Turnbull, I believe you stated that one of the principles of Unionism was this matter of seniority, did you not?
> A. Yes."

Mr. Dwyer, another foreman witness, when questioned on this matter of seniority, said (R. I, 460):

> "Q. Who decides the matter of ability?
> A. Your own self has a lot to do with it by what you can show.
> Q. And that is decided by the Union or the Company?
> A. That is the question.
> Q. That is quite a big question, isn't it?
> A. You bet, that is why we are here today."

On the matter of seniority the Panel of the N. W. L. B. said (R. III, 2062-2064):

> "In particular, the Panel believes that it would be unfortunate for a government agency to require managements to adhere to a straight seniority rule in making lay-offs, demotions and transfers of foremen. Certainly the principle of rewarding merit and ability requires no apology. This is especially true in the case of executives such as foremen. The efficiency of each foreman determines in substantial measure the efficiency of many men under him and, in some instances, the efficiency of cooperating departments. It may also determine in large measure whether the relations between the company and a rank and file union are harmonious or full of friction and difficulties. Consequently, both the public and the rank and file workers have a strong

interest that the positions of foremen be filled by the most capable men available regardless of their length of service.

The Panel believes that great weight should be attached to the dependence of higher management on the competency of foremen. When the managers of an enterprise select foremen to whom they delegate authority and responsibility they are not relieved of accountability for results. They are expected to pick competent men on whose good judgment and reliability the superior can depend. The Panel calls attention to the fact that foremanships are to considerable extent the seed bed for higher management. Furthermore the men who hold high positions in management are chosen in part for their skill in selecting and developing subordinates into an effective organization. They should be free within broad and reasonable limits to exercise these functions and to select and develop men for greater responsibilities. To require management to follow straight seniority in making lay-offs would seriously restrict the use of foremanships as a developing ground for higher management. It would create serious staff problems of efficiency and morale. *For these several reasons the Panel concludes that, while seniority should be given weight, management must be left to determine for itself the appropriate weight to be assigned to merit, ability and seniority in laying off, demoting, or transferring supervisory employees.* * * *

The reasons which led the Panel to recommend that each management be left free to assess for itself the relative weight to be accorded to seniority, merit, and ability in the case of layoffs, demotions, or transfers apply even more forcibly in the case of promotions. Higher management frequently needs young, aggressive, and energetic men. Furthermore able foremen and assistant foremen of only a few years experience but of exceptional promise are entitled to reasonable opportunities to demonstrate their capacities and to rise to greater responsibili-

> ties. The attachment of excessive weight to seniority in promotions would go far to reduce the drive to excel among the foremen and would limit the opportunity of young men to forge ahead. Its effect upon the quality of management and upon the enterprise and efficiency of American industry would be unfortunate, if not disastrous. The effect on the rank and file would also be undesirable. * * *"

Foremen must be permitted to develop as individuals. Those who have the desire to succeed, who are willing to study and better themselves, should not be held down by those who do not have the desire or ability or the same courage or energy. It would be detrimental to industry and to the country to discourage the ambitious foreman by a system under which he could only advance by passage of time.

Management is constantly looking for good supervisors. Many of the men who now head the various automotive industries came up through the ranks of foremen. It is essential that the best men be selected both for the good of industry and the good of the country. Management must have the responsibility of selecting the managers. It cannot delegate this duty to a union or to a third party. Management would not under such circumstances be in charge of the business, for the organization or person that has control of the promotion of supervisors controls the Company. To force industry to recognize the Foreman's Association would be to force upon industry the principle of seniority and this in turn would ultimately destroy the management structure.

Management has the ultimate responsibility for the success or failure of a business. If it has this responsibility, then it must have the authority and the power to decide as among its supervision who should be promoted. When management loses the uncontrolled right to choose the

managers it cannot be held responsible for the effective production.

This matter of seniority and promotion based on merit and not on popularity goes to the very substance of proper and efficient management. Surely Congress never intended to set up a union in management which would force top management to accept the union's decisions, or the decisions of some outside third party, as to promotion, demotion, transfer or discharge of foremen.

At the Hearings before the House Military Committee on March 1, 1943, shortly after the Board had decided the *Union Collieries* case, *supra*, and when the Committee was considering clarifying the Act for the purpose of nullifying the effect of that case—which action became unnecessary because the Board just at the close of the hearings reversed itself in the *Maryland Drydock* case, *supra*—representatives of industry were called to testify. It was pointed out that since the foreman exercises managerial authority, he must be solely and exclusively responsible to higher management; that the dual allegiance which would arise if foremen were unionized would impair their ability to fulfill their responsibilities to maintain efficiency and discipline of the men under their direction, and that under such circumstances management could not continue to give the foremen such authority any more than the Army could risk granting a commission to one who holds partial allegiance to another country.

It was pointed out that turmoil and confusion would be inevitable; management's policies would not be carried out; reports to management from supervision could not be relied upon; effective leadership would be gone; and the overall result would be the higher cost of the ultimate product. That more men would be required to get out a given production schedule; manpower would be wasted;

and American industry would be forced to change its proven type of shop management.

The importance of foremen in the mass industry and the effect of forced collective bargaining with a union of supervisors was demonstrated at the oral hearing held in connection with this case at Washington on February 27, 1946, where representatives of some of the largest companies in the mass production industry appeared (R. II, 1176-1298). It was the position of these representatives of industry that foremen were the first line of management—a vital cog in the managerial structure of industry—and so important to management that if they could not continue to exercise their present authority because of the union control which would develop through the granting of collective bargaining, it would be necessary to make a far-reaching reorganization of their managerial duties and reduce their status.

These men were not theorizing—they spoke from experience of many years in mass production industries. They knew how mass production is accomplished. They knew what the effect of forced unionism of foremen would be, for they had lived with unionism for years. They are experts in their field and interested in producing goods. If collective bargaining with the foremen would assist in more efficient and orderly running of their manufacturing plants, they would welcome it.

They knew, however, from experience that this would not be the result. They knew that: "The strategy of discipline is not simple. The maintenance of authority hinges upon a delicate complex of human relations."

(*Southern S.S. Co. v. N.L.R.B.*, 316 U. S. 31).

They knew that if their foremen were swept into the union stream, it would mean a disruption of discipline and authority and of the managerial system in industry

that has made this country the greatest producing country the world has ever known. They knew that any forced collective bargaining with the foreman level of management would be detrimental to the foremen because industry would be forced to reduce the status of the foreman; that it would be bad for the country because the necessary reorganization would result in lessened efficiency; that it would increase production costs, thereby increasing the cost of living.

As stated by the National War Labor Board Panel (R. III, 2063):

> "The effectiveness of management requires that it have its own uncontrolled agents to represent it in dealing with the rank and file, just as the rank and file are entitled to have their own uncontrolled representatives for dealing with higher management."

The extent to which the Board has gone in breaking down the power of management to manage is clearly set forth in *Matter of Allis-Chalmers Manufacturing Co.*, 70 N.L.R.B. No. 34 (18 L. R. R. N. 1363), decided in August of this year. The Company transferred certain duties of inspector supervision to a higher level of supervision. An unfair labor practice proceeding was brought before the Board by the inspectors, and the Board decided that the Company had committed an unfair labor practice in divesting the inspectors of certain of their responsibilities and reducing their privileges and wages. The Board ordered that the inspectors be restored to their former positions with the *same responsibilities, privileges, prestige and wages.* Thus, the Board has taken upon itself, because it erroneously decided in the first instance that supervisors are "employees" within the meaning of the Act, the power to dictate to management who its supervisors must be and what their powers, rights and privileges must be. There

can be no denying of the fact that the Board by this decision has assumed the authority to supervise management in connection with its selection of its supervisors. Management cannot continue to manage under such circumstances. It is inconceivable that Congress ever intended that the National Labor Relations Board should have such broad and unlimited power.

Because of the decisions of the Board on this question of enforced unionization of supervisors, management is placed in an intolerable situation. As noted above, the petitioner in this case would be held responsible for statements and conduct of its supervisory employees if hostile to the unions, and also responsible under the case of *Heinz v. N.L.R.B.*, 311 U. S. 514, and other decisions of the Board and courts for statements and conduct that would favor one union against another. Mr. Turnbull, a general foreman and officer of the FAA, testified in the instant case that he would fight the organization of a rival union of foremen in the same manner that the CIO would fight another rank and file union (R. I, 574). Turnbull further stated that if a member of the FAA tried to influence a foreman to join the rival foremen's union, charges would be brought against the member for dual unionization, and he would be dealt with by the Union board (R. I, 576). For example, if an organizational drive was started in the plants of the petitioner to organize another union of foremen, and a foreman sought to recruit members for the new union, what would be the position of the petitioner? Under the decisions of the Board and of this Court, if the petitioner should discharge or discipline the participating foremen, it would be subject to the risk of an unfair labor practice complaint under Section 8(3) of the Act on the ground that the petitioner was discouraging membership in a labor organization. If the petitioner refrained from disciplining the foremen, then

under the authority of the *Heinz* case and other like cases, the petitioner might be liable under an unfair labor charge for encouraging membership in one labor union as against another. The petitioner would be placed in an impossible situation.

It is submitted that it was never the intention of Congress that the Act should be construed to bring about such an absurd situation. The result, of course, stems from the fact that the Board and the lower court in this case determined that supervisors could be, at one and the same time, "employers" and "employees" under the Act.

> *3. The fact that the representative of the foremen in this case is a so-called independent union will not cure the evils resulting from enforced collective bargaining with a unit of management.*

In the instant case the Board found that a unit of foremen would be appropriated if represented by a union not affiliated with a rank and file union. Subsequent to the Board's decision in this case but prior to the hearing in the lower court the Board held, as noted above, in *Matter of Jones & Laughlin Steel Corp.*, 66 N. L. R. B. 386, that the Board was powerless to deny supervisors or any other unit of employees the right to select as a representative any bona fide labor union, whether affiliated or non affiliated.

It is assumed, however, that this case will be considered on the basis that the FAA, the foremen's union that will be represent the foremen of the petitioner is a claimed independent organization.

It is important therefore in considering whether or not Congress could have intended that foremen should be included under the statutory definition of "employee" or whether such foremen would constitute an appropriate

unit "to effectuate the policies' " of the Act to investigate just what the relationship is between the FAA and the larger rank and file unions, and just what pressure will be brought to bear on the officers of the FAA and its members if the respondent is required to collectively bargain with the FAA.

Mr. Keys, the President of the FAA, stated that he has only received moral support from the larger rank and file unions (R. I, 207). This ignores the realities of the situation in the Detroit area, where the CIO is strongly entrenched, and where it completely dominates the rank and file workers of Detroit's mass production industries, including those of the petitioner.

The truth is that if the foremen are held to be an appropriate group for collective bargaining and collective dealing with management, the foremen will be caught in a current of unionism and the labor movement with all that implies and involves. The foremen will be unavoidably arrayed against the management of which they are a part. Sympathetic support by the FAA through union action of the CIO, the rank and file union in the respondent's plants, will unavoidably follow. The FAA will expect and receive sympathetic and active cooperation from the powerful CIO. The strong bond of union feeling and sympathy between the union men and between groups in the labor movement will find expression and action in the conduct of foremen directly against and hostile to management. The following testimony and exhibits throw light on the collaboration between the CIO and the leaders of FAA.

The following circular, addressed to Murray Corporation foremen, was distributed by the CIO on behalf of the FAA, and was "handed out not only by foremen, but by workers too" (R. I, 216). It says (R. I, 202-203):

"Now the time has arrived when the long standing record of unionism at the Murray Ecorse plant is being seriously tested. The Murray Corporation of America is and has been attempting by all means to destroy the union which your foremen have created. Are you as a Union person going to permit the destruction of your Foremen's Union? With your cooperation your foremen will succeed in their struggle for contract rights such as you enjoy. You will be enticed and pressured by the Murray Corporation to weaken the position of the foreman's union. Will you as a Union person be tempted?

"Labor unions up until the formation of the Foreman's Association of America have always had the threat of foremen who would employ scabs demanded when to do so by management in order to weaken the position of a labor union. Since the founding of the Foreman's Association of America labor no longer need worry of foremen who are members of the Foreman's Association of America placing scabs in the jobs of workers who are idle because of a labor dispute.

* * * * * *

"We, the Murray Ecorse foremen, know you won't let us down, and pledge that we will not let you down in disputes which you have in the future."

The following article, printed in large, blackface type, appeared in the "Victory News," an official publication of the UAW-CIO at the Dodge-Chicago plant on March 24, 1944 (R. III, 1527):

"FLASH!! FOREMEN ORGANIZE!

"R. J. Thomas, President of the UAW-CIO, has repeatedly said, 'It's companies like Chrysler that make unions like ours.' Again history is repeating itself. With 14 Chrysler plants under contract to CIO and this big Dodge Chicago union raising a fury to get recognition a new union comes into the picture.

"This union is also organized in all the other Chrysler plants and while their policies are not always in accord with ours of UAW, we wish to welcome them on the true principles of honest unionism.

* * * * *

"We of the UAW-CIO, watch the organizing of this group with interest, and we know if the foremen are organized they will be better equipped to understand our problems and the principles and fact of grievance procedure through union negotiation.

"We wish to stress at this time that our Local 274, and the UAW-CIO, are not affiliated in any way with the Foremen's Association of America. *We do know, however, this union is composed of many former CIO members and that this union was supported (when it organized) by the UAW when it had its fight in Detroit for recognition as a bargaining group.*"

The Michigan State CIO Council, meeting on June 29, 1943, passed and published the following resolution (R. III, 1528):

"WHEREAS: The National Labor Relations Board has refused to grant collective bargaining rights and other rights guaranteed by the Wagner Act to Foremen, and

"WHEREAS, This action is discriminatory, unfair and unjust, now therefore be it

"RESOLVED: That this Convention of the Michigan State CIO Council go on record supporting the fight of the Foremen to establish collective bargaining rights and other rights guaranteed by the Wagner Act, and be it further

"RESOLVED: That copies of this resolution be sent to the Smith Committee, President R. J. Thomas, President Philip Murray and the Foreman's Association of America."

The present attitude of cooperation of the Flint UAW-CIO with the FAA (and this cooperation is certainly more than mere "moral support") is set forth in an article in "The Searchlight," the official publication of UAW-CIO, Chevrolet Local No. 69, Flint, Michigan, issue of March 1, 1945. This article (R. III, 2090) reads as follows:

"FOREMEN'S ASSOCIATION MAKING DEFINITE PROGRESS AT CHEVROLET

"Weak Sisters Slow Tempo of Organization Drive

"By Geo. Carroll

"About 300 Chevrolet Foremen have received credentials as members of the Foremen's Association of America to date.

"However, in a talk with Mr. Kelley, contact man of the association, about a week ago, he stressed the fact that while this is a creditable showing the most difficult phase of organization has apparently been reached.

"In other words, the bottom of the barrel has been reached insofar as mere salesmanship is concerned and from now on pressure will be required to convince the more timid foremen that they will need protection in post-war days, as thousands of well trained young technicians are demobilized.

"I have heard Otto Ramlow talk to some of his foremen as if they were slaves and I wondered if it wouldn't be worth a couple of dollars a month to them to be able to tell that old buzzard to go to h——.

* * * * * *

"I am certain of one thing, however, after the war, when the corporation will be in a frenzy to build cars, this plant is one which no doubt will have strike after strike before G. M. comes to its

senses and any foreman who does not hold a card in the association will be given little consideration by union men.

"If they receive rough treatment they will have no one to blame but themselves.

'Better think it over, any of you foremen who still nourish scabby ideas.

"In other words, 'you better get in, before we begin.' "

The position taken by union representatives at the hearing before the Board fully supports the positio ntaken by the respondent on this matter of collaboration.

Mr. Nelson, attorney for the FAA, stated during the oral argument of this case (R. III, 1221, 1222, 1223):

"Mr. Nelson: I will admit on the record that when the foremen struck, there was a direct and express agreement between us and the responsible CIO leaders that members of the CIO Maintenance and Production Workers Union would not be permitted to take the place of foremen. Now that is a two-way proposition. If we have a strike, we will be called on to say that we don't do the work of the striking men."

* * * * *

"Mr. Houston: Do you have any agreement with the CIO that they will not cross your picket lines?

"Mr. Nelson: That we adjust at each plant in each incident. In certain places, take the Republic Steel, the Maintenance and Production Workers refuse to cross the foremen's picket line. That is a matter of union spirit."

* * * * *

"I am bound to say I hope that I will never hear of a foreman crossing a picket line by anything but agreement. We don't want these foremen to be just mere appearance of union men. The essence of

> union action in a strike is to withdraw labor power and skill from the use of a given employer, and I hope that we won't be faithless in our obligation to our brother workers, and we hope he won't be to us, but as an equal give and take."

It follows that the union leaders of the FAA and the CIO will collaborate to gain their objective. Favors granted must be returned. Furthermore, the dominating party will be the rank and file union for it is only by sufferance that the FAA will be allowed to exist. The officers of the FAA to retain their positions will be forced to carry out the instructions and plan of the CIO. In order to do so, they in turn will be forced to apply the usual formal and informal pressure on the individual foreman in order to comply with the demands of the CIO. Obviously, under such conditions, management would no longer manage through the foreman.

But the rank and file unions will not stop with domination and control of the FAA. The FAA will be absorbed as have other so-called independent unions (R. II, 832, 1091, 1092, 1699).

Consequently, for the purpose of this case, whether through domination or control or through actual absorption of the FAA, the rank and file CIO will represent and be the spokesman for the foreman unit if the Court affirms the Board in this case.

It is submitted, therefore, that it was not proper, would not effectuate the purposes of the Act, is against the public interest, and was an abuse of discretion for the Board to determine, and the lower court to approve, the regimentation of the Packard foremen in a unit for the purpose of collective bargaining.

POINT III

THE CIRCUIT COURT OF APPEALS, AFTER HOLDING THAT THE PETITIONER'S GENERAL FOREMEN, FOREMEN, ASSISTANT FOREMEN AND SPECIAL ASSIGNMENT MEN WERE "EMPLOYEES" WITHIN THE MEANING OF THE ACT AND COULD BE PLACED IN AN APPROPRIATE UNIT, ERRED IN HOLDING THAT THE BOARD COULD PROPERLY INCLUDE SUCH EMPLOYEES IN A SINGLE UNIT FOR THE PURPOSES OF COLLECTIVE BARGAINING

In *Matter of Murray Corporation of America*, 47 N. L. R. B. 1003, and in *Matter of Boeing Aircraft Co.*, 45 N. L. R. B. 630, the Board held inappropriate a unit consisting of several ranks of supervision where each rank exercised authority over the rank below it. The Board then changed its mind and in the Packard case now before the court reversed itself. The Board stated its reasons thus:

> "All four classes of employees are supervisors who perform no manual work, and while they usually function on different levels, their duties and responsibilities are substantially alike. Moreover, it is common for a foreman—like most general foreman—to be in charge of an entire department, and in cases where there are no foremen in a department, an assistant foreman will often serve in a position which corresponds to a foreman's job in another department. In many respects, the Company itself treats these employees as a single group. Thus, substantially all are paid a salary upon the basis of a 40-hour week, with time and one-half for overtime; all four classes attend the Company's Foreman's School, with no distinction whatever between them; all four classes enjoy certain common privileges and advantages such as justifiable absences with pay, vacation with pay, separation pay, the privilege of reporting one half hour late for work without being docked in pay, and all four wear ordinary street clothes at the plant * * *."

The Board might as well have said that these distinct levels of supervision are all members of the human race. If paying people salaries, training them in classes on management, granting them sick leaves and vacations, not docking them for time off for tardiness, the fact that they wear street clothes, and substitute for each other in case of absence are valid considerations in determining a unit, then, the Board's criteria for determining what units will "effectuate the policies of the Act * * *" are strangely unrelated to the purposes of the Act.

A general foreman of the petitioner, as shown by the record, has supervision over the foremen and assistant foremen below him and has the power to recommend their discharge, advancement or demotion (R. I, 564, 642, 610, 646, R. II, 999). The recommendations of the general foremen are usually carried out (R. II, 955, 999). This is necessary as a practical matter, for it is the general foreman who is directly in contact with the foremen and assistant foremen and the only management representative who is in position to judge their capabilities and actions.

The Board would place the 125 general foremen of the petitioner in the same unit with approximately 1,000 foremen and assistant foremen (R. III, 1814, 1815). What chance would the conscientious general foreman have under such conditions, where they could be outvoted almost 10 to 1? A general foreman would be regimented in a unit of the very men over whom he has for all practical purposes the power to promote, demote, discipline and discharge.

The general foremen were given no opportunity to decide whether they desired to be placed in the same unit with the men they supervise (R. III, 1821). Out of the votes counted, which did not include the challenged votes, 666 voted in favor of the FAA and 435 against (R. III, 1835). It is impossible to determine how many of the general foremen voted against the FAA.

It can hardly be said to be fair or democratic to regiment the general foremen into such a unit without giving them a voice in the matter; to herd them willy-nilly into an organization without permitting them to express themselves.

For the same reasons set forth above, foremen should not be included in the same unit with the assistant foremen, or at least should be given an opportunity to voice their desires in the matter. This was done in the recent case *Matter of Kelsey-Hayes Wheel Co.*, 66 N. L. R. B. 76 (March 11, 1946), where the Board permitted general foremen to vote on the question of whether they desired to be included in the same unit with the foremen and assistant foremen they supervise. The Board's records will disclose that there were approximately 114 foremen and 29 general foremen and that the general foremen voted 23 against the FAA and only 4 in favor of the FAA.

The Board cites as authority for its action certain cases involving the printing and maritime trades. The record is barren as to the duties and responsibilities of the supervisors in those trades. Member Reilly in his dissenting opinion in the instant case (R. III, 1883-1884) as hereinbefore noted, pointed out that these examples have little relevancy to the present controversy, and that the pattern of collective bargaining established in them grew up independently of the Act, and in certain respects quite contrary to its basic concepts.

In *Matter of Soss Manufacturing Co.*, 56 N. L. R. B. 349, 357, the Board said:

> "The express purpose, of course, for which foremen and other supervisory officials are hired is to represent management in its relation to production workers. In such situation, management is, of course, entitled to the undivided allegiance of the foremen, which implies such foremen being free from the orders and directions of organizations

> composed primarily of subordinate employees. By the same token, it should be implied that the general foremen and all foremen should be free from the orders and directions of the foremen or assistant foremen which they supervise."

The following paragraph taken from the Railroad Workers Journal and quoted by Member Reilly in his dissenting opinion in *Matter of Jones & Laughlin Steel Co.*, 66 N. L. R. B. No. 51, deserves attention:

> "Just picture a foreman, who is just an ordinary member of his union, getting into an argument with the president or business agent of his own union in a meeting. I would venture to say that his union status would not be so good, and if it is not according to union contract under the closed-shop system, he can be expelled for union insubordination. If he is expelled from the union, he is automatically expelled from the company. A nice system of eliminating the conscientious foremen."

It goes without saying that not only would conscientious foremen be eliminated, but the whole function of foremen as part of supervision would cease to exist.

In the case of *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 146 F. 2d 718, this Court had before it the question of representation of a unit consisting of plant guards. The Court pointed out that in case an election is held under the Act, the Board should consider the will of the majority of the employees but the result of the election would not altogether conclude the matter. The Court cites in that connection the case of *N.L.R.B. v. Delaware, New Jersey Ferry Co.*, 128 F. 2d 137, where the Court said:

> "* * * But the point here is not what the officers want nor what the men want nor what the company either wants or is willing to acquiesce in, but rather what is the public interest."

The Court then pointed out that if the guard unit is to be represented by the rank and file union the guards

"might in their effort to discharge their duty to their employer find themselves in conflict with other members of their union over the enforcement of some rule or regulation they were hired to enforce * * *. We think that the imposition of such strains upon personal allegiance and personal interest would undoubtedly be detrimental to the public interest and to the freeflow of commerce."

If the general foremen are regimented into one unit, there would be the same result, for in their effort to discharge their duty to their employer, the petitioner in this case, with respect to the discipline, promotion, demotion or discharge of the foremen or assistant foremen under their supervision, they will find themselves in conflict with these other members of the union over the exercise of their responsibilities and duties. The "imposition of such strains upon personal allegiance and personal interest would undoubtedly be detrimental to the public interest and to the free flow of commerce."

If any unit for foremen were "appropriate" it could only be so if each level constituted a separate unit and was represented by a separate organization unit, with no obligations to others, and subject to no domination by them or by the rank and file.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Sixth District should be reversed and that the Court be directed to enter an order dismissing the petition for enforcement filed by the National Labor Relations Board in this case.

Respectfully submitted,

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APPENDIX A

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

FINDINGS AND POLICY

Section 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment, or inter-

ruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SECTION 2. When used in this Act—

* * * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any indi-

vidual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(9) The term "labor dispute" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

SECTION 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SECTION 8. It shall be unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to Section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII,

title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (or any agency established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SECTION 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to Section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this Section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SECTION 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the

pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to aduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).